# In the Supreme Court of the United States

OCTOBER TERM, 1970

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No. 1091

ELLIOT L. RICHARDSON, SECRETARY OF HEALTH, EDUCATION AND WELFARE, APPELLANT

*v.*

RAYMOND BELCHER

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*ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA*

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## INDEX TO APPENDIX





419-403—71——1

*The pages of the transcript of the hearing carry two sets of numbers in the original—one set reflecting the internal pagination of the transcript and another set reflecting the pagination of the transcript within the entire administrative record. Those portions of the transcript which are reproduced in this Appendix contain a bracketed reference to the latter set of numbers.

# RELEVANT DOCKET ENTRIES

No. 1185 in the United States District Court For the Southern District of West Virginia

| Date | Filings—Proceedings |
|---|---|
| 1970 | |
| February 20 | Complaint for Review of Decision Under Social Security Act, filed |
| June 19 | Answer, Together With Certification of Administrative Record, filed |
| August 17 | Defendant's Motion for Summary Judgment, filed |
| August 21 | Plaintiff's Motion for Summary Judgment, filed |
| September 10 | Memorandum Opinion of Court Granting Plaintiff's Motion for Summary Judgment and Denying Defendant's Motion for Summary Judgment, filed |
| September 14 | Judgment Order Reversing Decision of Secretary of Health, Education and Welfare, filed |
| October 13 | Defendant's Notice of Appeal to the United States Supreme Court, filed |

No. 1091 in the United States Supreme Court

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|---|---|
| 1970 | |
| December 11 | Jurisdictional Statement, filed |
| 1971 | |
| February 10 | Brief for United Mine Workers of America, as Amicus Curiae, filed |
| February 11 | Motion to Affirm, filed |
| March 1 | Order of Court Noting Probable Jurisdiction |

In the United States District Court for the Southern District of West Virginia at Bluefield

Civil Action No. 1185

RAYMOND BELCHER, PLAINTIFF

*vs.*

ROBERT H. FINCH, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, WASHINGTON 25, D.C., DEFENDANT

## COMPLAINT

Plaintiff, Raymond Belcher, whose post office address is General Delivery, Clear Fork, Wyoming County, West Virginia, states:

1. This action is brought pursuant to authority of the statute of the United States as set forth in United States Code, Title 42, Section 405(g), being Section 205(g) of the Social Security Act, as amended, to obtain a judicial review of a final decision by defendant by his Hearing Examiner; Herman T. Benn, dated October 31, 1969, review of which was refused by order of the Appeals Council of the Department of Health, Education, and Welfare by order dated January 20, 1970, in the matter of the claim of Raymond Belcher, Social Security Account Number 231-05-7239, for reduction of plaintiff's benefits under Section 224 of the Social Security Act by reason of the plaintiff having received from the West Virginia Workmen's Compensation Fund benefits for an injury dated March 25, 1968.

2. Plaintiff is an individual, residing at Clear Fork, Wyoming County, West Virginia, and is fifty-one (51) years of age, and was granted disability benefits based on his application filed May 20, 1968, beginning March 25, 1968, in the amount of $156.00 monthly, and to his wife and two children in the amount of $57.90 each, effective October, 1968; that on April 30, 1969, the Workmen's Compensation Director of the State of West Virginia granted the claimant Workmen's Compensation benefits in the amount of $47.00 per week, beginning March 26, 1968, and that the plaintiff drew said amounts for 46 4/7ths weeks at the rate of $47.00 per week from March 25,

1968, in the total amount of $2,188.86; that notice was given to the plaintiff on January 27, 1969 that an off-set was being imposed against the benefits received by the plaintiff, his wife and two children pursuant to the provisions of Section 224 of the Social Security Act.

3. Your plaintiff states that pursuant to the said notice by the defendant dated January 27, 1969, your plaintiff's wife and children's benefits were reduced in accordance with the formula set forth in Section 224 of the Social Security Act.

4. Denial of your plaintiff, plaintiff's wife and children's full benefits as set forth in the original award of the defendant effective October, 1968, under the circumstances of his case is erroneous and not justified by the law applicable thereto, in that it specifically violates your plaintiff's rights as follows:

(a) That Section 224 of the Social Security Act, as amended, effective June 1, 1965, in applying a formula which takes into consideration benefits received by the plaintiff from the West Virginia Workmen's Compensation Act is a fund that is solely supported by contributions of employers of the State of West Virginia and that no part of said fund is Federal or State tax money; that the fund is a voluntary fund for employers engaged in business in the State of West Virginia, and is designated to make whole a person who is injured while working for an employer in the State of West Virginia and to prevent suits against the employer for damages if he is a member of the fund, as if he is not, the employee may sue the employer. It being specifically contended that membership in the Workmen's Compensation Fund is voluntary and to apply a law to the plaintiff or any person in the plaintiff's class reducing his Social Security benefits which has as its standard dependent wholly upon whether an employer desires to become a member of the West Virginia Workmen's Compensation Fund as contrasted to an employer who does not desire to become a member of the fund and has employees who may collect benefits either by way of insurance carried by the employer, voluntary payments by the employer, or by court proceedings for damages against the employer if he is not a member of the West Virginia Workmen's Compensation Fund. The plaintiff contending that this standard is abstract and discriminatory, denying your plaintiff his property without due process of law, and, therefore, violates his constitutional rights to receive the maximum benefits under the Social Security Act based on his application of May 20, 1968.

(b) That Section 224 of the Social Security Act requiring the Department of Health, Education and Welfare to promulgates rules and regulations effective June 1, 1965, and to reduce benefits of the plaintiff by the use of the formula set forth in Section 224 of the Social Security Act to 80% of the plaintiff's monthly earnings based on the five highest years after 1950 and prior to the date of his disability is unconstitutional, in that it is an act requiring the defendant to discriminate between the plaintiff and other recipients disabled prior to June 1, 1965, as his disability began after June 1, 1965. It being specifically contended that the law requires discrimination within a particular class.

(c) That the West Virginia Workmen's Compensation Fund created by the Acts of the West Virginia Legislature is financed solely by employers engaged in business in West Virginia is voluntary, is considered a part of the cost of doing business in the State of West Virginia, and constitutes a property right to the plaintiff and any employee who is employed in the State of West Virginia whose employer has elected to become a member of the Workmen's Compensation Fund, and, therefore, to use benefits received by the plaintiff to deny disability benefits which he is entitled to under the Social Security Act is also a property right, and denial thereof constitutes a taking of property without due process of law.

(d) That Section 224 of the Social Security Act requiring the Department of Health, Education, and Welfare to reduce or apply the formula as set forth in Section 224 of the Social Security Act to plaintiff, who is a recipient of Workmen's Compensation benefits pursuant to the West Virginia Workmen's Compensation Act of the State of West Virginia, a voluntary fund, either on a temporary total disability basis or on a permanent partial disability basis or a total and permanent disability basis, is invalid and unconstitution Act of Congress, in that it deprives the plaintiff, his wife and dependent children of property rights without due process of law, and further that the reduction of benefits of the plaintiff's wife and children is also unconstitutional and unauthorized under Section 224 of the Social Security Act, when such formula as set forth in Section 224 does not apply to recipients of disability benefits under Sections 216 (i) and 223 of the Social Security Act which have had a period of disability established prior to June 1, 1965.

WHEREFORE, your plaintiff seeking aforesaid review, demands judgment that the decision of the defendant by his said Hearing Examiner and Appeals Council be reversed; that Section 224 of the Social Security Act is held inapplicable to the plaintiff's case; that Section 224 of the Social Security Act be declared unconstitutional, in that it singles out the plaintiff to deny him benefits he, his wife and children would otherwise be entitled to, except for his right to receive benefits from a voluntary fund, the West Virginia Workmen's Compensation Act; as the standard set forth in Section 224 of the Social Security Act is vague and requires the Secretary to discriminate between your plaintiff and other persons of the same class with disabilities established prior to June 1, 1965; that denial of the plaintiff's full benefits by reduction thereof pursuant to the terms of Section 224 of the Social Security Act constitute a denial of property without due process of law; that Section 224 of the Social Security Act is unconstitutional, in that it fails to give equal protection to all people of the same class; and that your plaintiff may have such other and further relief as to the Court may seem fit to grant.

RAYMOND BELCHER,
*By Counsel.*

WEST, BLACKSHEAR & RUNDLE,
*Attorneys at Law, P.O. Drawer 469,*
*Pineville, West Virginia,*
By: MARSHALL G. WEST,
*Counsel for Plaintiff.*

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United States District Court for the Southern District of West Virginia

[Title Omitted in Printing]

ANSWER

Comes now the defendant, Robert H. Finch, Secretary of Health, Education, and Welfare, by Leo J. Meisel Assistant United States Attorney for the Southern District of West Virginia and answers plaintiff's complaint herein filed, and for answer says:

1. Defendant admits the allegations in paragraph 1 thereof.

2. Defendant admits the allegations in paragraph 2 thereof, except that defendant states that based on the application filed

by the plaintiff on May 20, 1968, he was granted a period of disability beginning March 25, 1968, and benefits were paid to him, his wife and two children beginning with October 1968 in the amount of $156.00 a month to him and to his wife and two children in the amount of $57.90 a month each; and defendant further states that he has no knowledge or information sufficient to form a belief as to the truth of the allegation that plaintiff received workmen's compensation benefits from March 26 1968, totalling $2,188.86.

3. Defendant admits the allegations in paragraph 3 thereof.

4. Defendant denies each and every allegation in paragraph 4 thereof.

5. Under the provisions of section 205(g) of the Social Security Act, 42 U.S.C. 405(g), the jurisdiction of the Court in this action is limited to a review of the final decision of the defendant referred to in the complaint, and to the entry, upon the pleadings and transcript of the record herein, of judgment affirming, modifying, or reversing the defendant's decision, with or without remanding the cause for a rehearing.

6. Defendant further denies that plaintiff is entitled to the relief for which he prays under the applicable provisions of the Social Security Act; and also states that the facts and issues in this action are fully set forth in the transcript of the record herein, including the evidence on which the findings and decisions complained of are based, copy of which is attached hereto as part of the answer pursuant to section 205(g), above.

7. Defendant states that the complaint fails to state a cause of action.

8. Defendant states that the findings of fact of the Secretary of Health, Education, and Welfare are supported by substantial evidence and are conclusive.

WHEREFORE, defendant prays for judgment dismissing the complaint with costs and disbursements, and for judgment in accordance with section 205(g) of the Social Security Act, as amended (42 U.S.C. 405(g)), affirming the decision complained of.

(S) Leo J. Meisel
LEO J. MEISEL,
*Assistant United States Attorney.*

[Certificate of Service Omitted in Printing]

United States District Court for the Southern District of West Virginia

[Title Omitted in Printing]

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Now comes the defendant and respectfully moves the Court for summary judgment in the above-entitled action pursuant to Rule 56(b) of the Federal Rules of Civil Procedure, on the ground that upon the pleadings and the transcript of the record of which a certified copy was filed herein as part of the defendant's answer pursuant to Section 205(g) of the Social Security Act, as amended, 42 U.S.C.A. Section 405(g), the defendant is entitled as a matter of law to a judgment affirming the defendant's decision herein complained of.

(S) Leo J. Meisel
LEO J. MEISEL,
*Assistant United States Attorney.*

[Certificate of Service Omitted in Printing]

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In The United States District Court for the Southern District of West Virginia

[Title Omitted in Printing]

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Now comes the plaintiff and respectfully moves the Court for Summary Judgment in the above-entitled action pursuant to Rule 56–B Federal Rules of Civil Procedure, upon the grounds that upon the pleadings and the transcript of the record of which a certified copy was filed by the defendant herein as part of the defendant's answer pursuant to Section 205 (g) of the Social Security Act, as amended, 42 U.S.C.A., Section 405 (g), the plaintiff, as a matter of law, is entitled to judgment reversing the decision of the defendant and granting the relief as prayed for in the plaintiff's complaint.

RAYMOND BELCHER, By Counsel.
WEST, BLACKSHEAR & RUNDLE,
Attorneys at Law. *P.O. Drawer 469,*
*Pineville, West Virginia,*
By: Marshall G. West,
MARSHALL G. WEST,
*Attorney for Plaintiff.*

[Certificate of Service Omitted in Printing]

In the United States District Court for the Southern District of West Virginia at Bluefield

Civil Action No. 1185

RAYMOND BELCHER, PLAINTIFF

*v.*

ELLIOT L. RICHARDSON, SECRETARY OF HEALTH, EDUCATION AND WELFARE, DEFENDANT

[Memorandum Opinion]

CHRISTIE, *District Judge:*

This is an action under Section 205(g) of the Social Security Act, 42 U.S.C.A. 405(g), to review a final decision of the Secretary of Health, Education and Welfare. A decision by a hearing examiner on October 31, 1969, became the final decision of the Secretary on January 20, 1970, when it was affirmed by the Appeals Council. The matter is before the Court on the cross motions of the parties for summary judgment pursuant to Rule 56.

The plaintiff filed an application for disability insurance benefits on May 20, 1968, alleging that he became unable to work on March 25, 1968, as the result of an injury. On May 20, 1968, his wife and children also applied for benefits under the Act. The Secretary having determined that plaintiff was disabled within the meaning of the Act, all applicants were awarded benefits on September 30, 1968, such benefits to begin with the month of October 1968.

Later, plaintiff received an award of $203.60 per month from the Workmen's Compensation Fund of West Virginia as the result of a work-related injury. Upon learning of this award, the Social Security Administration applied the "offset" provisions of Section 224 of the Social Security Act, 42 U.S.C.A. 424(a).[1]

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[1] Section 224 of the Social Security Act, 42 U.S.C.A. Section 424, as amended, July 30, 1965 and January 2, 1968, provides:

"(a) If for any month prior to the month in which an individual attains the age of 62——

"(1) such individual is entitled to benefits under section 223, and

"(2) such individual is entitled for such month, under a workmen's compensation law or plan of the United States or a State, to periodic benefits for a total or partial disability (whether or not permanent), and the Sec-

On February 10, 1969, plaintiff's attorney requested a reconsideration of the offset reductions which the Administration rejected on July 19, 1969. Thereupon, said attorney requested a hearing, held October 9, 1969, at which he presented argument supporting his claim that Section 224 deprived plaintiff and his family of a property right without due process of law and that it was discriminatory inasmuch as it discriminated unfairly between persons of a similar class. On October 31, 1969, the hearing examiner issued his opinion upholding the legality of the reduction of benefits. This decision became the final decision of the Secretary on January 20, 1970, when it was affirmed by the Appeals Council. Thereupon, plaintiff timely filed the instant action in this court.

## I

As previously noted (footnote 1), Section 224 provides for a reduction in social security disability benefits for such time as the claimant receives workmen's compensation benefits for either total or partial disability. Workmen's compensation laws

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retary has, in a prior month, received notice of such entitlement for such month, the total of his benefits under section 223 for such month and of any benefits under section 202 for such month based on his wages and self-employment income will be reduced (but not below zero) by the amount by which the sum of——

"(3) such total of benefits under section 223 and 202 for such month, and

"(4) such periodic benefits payable (and actually paid) for such month to such individual under the workmen's compensation law or plan,

exceeds the higher of——

"(5) 80 per centum of his 'average earnings', or

"(6) the total of such individual's disability insurance benefits under section 223 for such month and of any monthly insurance benefits under section 202 for such month based on his wages and self-employment income, prior to reduction under this section.

In no case shall the reduction in the total of such benefits under sections 223 and 202 for a month (in a continuous period of months) reduce such total below the sum of——

"(7) the total of the benefits under section 223 and 202, after reduction under this section, with respect to all persons entitled to benefits on the basis of such individual's wages and self-employment income for such month which were determined for such individual and such persons for the first month for which reduction under this section was made (or which would have been so determined if all of them had been so entitled in such first month), and

"(8) any increase in such benefits with respect to such individual and such persons, before reduction under this section, which is made effective for months after the first month for which reduction under this section is made."

generally provide compensation to employees for loss resulting from industrial accidents and disease growing out of or resulting from their employment. The need for such a system arose out of conditions produced by modern industrial development and was premised upon the idea that the common-law rule of liability for personal injuries incident to the operation of industrial enterprises, which was based upon the negligence of the employer, with its defenses of contributory negligence, fellow servant's negligence, and assumption of risk, was outmoded by modern conditions.

West Virginia's Workmen's Compensation Law is found in Chapter 23 of the West Virginia Code. The law creates a "Workmen's Compensation Fund" which is sustained by contributions made to it by the employers who voluntarily elect to come under the provisions of the law, such contributions being based upon a percentage of the gross wages of their employees. The employees make no direct monetary contributions to the fund and the system is state-operated. Basically, the law takes from the employee his common-law right to sue his employer for damages for negligence in return for payment from the fund of limited or scheduled benefits for disability or death resulting from or growing out of the employment relationship, regardless of any fault of the employer.

In West Virginia the relation of employer and employee, under the law, is termed contractual in nature, the statute becoming an integral part of the contract of employment, and imposing upon the employer and employee, respectively, a limitation of rights and liabilities. *Gooding v. Ott,* 77 W. Va. 487, 87 S.E. 862; *Lancaster* v. *State Compensation Comr.,* 125 W. Wa. 190, 23 S.E. 2d 601. Thus, in no sense of the word can one's workmen's compensation benefits be termed a gratuity; rather they must be treated as a contractual entitlement. So it is seen that the issue before this Court as to this aspect of the case is whether or not Section 224 of the Social Security Act, requiring reduction in plaintiff's social security benefits in proportion to the amount of his workmen's compensation benefits, may be constitutionally applied.

II

It cannot be seriously contended that the Social Security Act itself is unconstitutional for its constitutionality has been uphold in a long line of cases. *Helvering* v. *Davis,* 301 U.S. 619

(1937). See also *Steward Machine Company* v. *Davis*, 301 U.S. 584, (1937), and *Carmichael* v. *Southern Coal and Coke Company*, 301 U.S. 495 (1937). It is equally well settled that entitlement to social security benefits is subject to all conditions set out in the Social Security Act under which benefits are to be paid. *Flemming* v. *Nestor*, 363 U.S. 603 (1960); *Gruenwald* v. *Gardner*, 396 F. 2d 591 (2d Cir. 1968), cert. den. *Gruenwald* v. *Cohen*, 393 U.S. 982 (1968); *Price* v. *Flemming*, 168 F. Supp. 392 (D. Ct. N.J. 1968), affirmed 280 F. 2d 956 (3d Cir. 1960), cert. den. 365 U.S. 817 (1961).

Notwithstanding, as previously noted, plaintiff urges that the offset provision of Section 224 deprives him of his property (benefits) without due process of law. The answer would seem to hinge upon whether the plaintiff has such an indefeasible right or interest in his social security benefits that the concept of due process precludes application of the offset statute.

In *Flemming* v. *Nestor*, supra, the Court found that the old-age benefits of an alien, deported for cause under the Immigration and Nationality Act, could be lawfully terminatd without offending the Due Process Clause of the Fifth Amendment. There the Court rationalized that the noncontractual interest of an employee covered by the Social Security Act cannot be analogized to that of the holder of an annuity, where the right to benefits is based on a contractual duty to pay premiums, and further that to hold otherwise would render the law too inflexible to permit necessary adjustment to ever-changing conditions. Justices Black, Douglas and Brennan dissented, each filing a separate dissenting opinion and each strongly arguing that the alien had a property right in his old-age benefits and to deprive him of them was a violation of due process.

We have been referred to several unreported decisions of district courts and one reported decision, *Bartley* v. *Finch*, 311 F. Supp. 876 (E.D. Ky. 1970), in support of the defendant's position that Section 224 may be constitutionally applied, and it would indeed be easy for us to follow that path. However, we are not convinced that the issue raised in this case deserves such cavalier treatment, especially in view of the more recent decision of the Supreme Court in *Goldberg* v. *Kelly*, 397 U.S. 254 (1970), which tends to elevate entitlement to welfare to the status of a property right and to surround it with all the safeguards required by due process. Such benefits, the Court states (p. 262), are a matter of "statutory entitlement for persons qualified to receive them," and as support for this conclu-

sion the Court, in footnote 8 of the same page, refers to an article in the Yale Law Review stating that,

> "It may be realistic today to regard welfare entitlements as more like 'property' than a 'gratuity.'"

Therefore, since the Court in *Goldberg* appears to have determined that entitlement to welfare is in the nature of a property right, protected by the Due Process Clause of the Fifth Amendment, by the same rationale it must be determined that one who has made direct contribution to the social security fund and becomes entitled to disability benefits thereunder should and ought to be accorded equal status and protection. For it seems to us to be patently unfair for the welfare recipient, under *Goldberg*, to have a "property right status" with all the procedural safeguards of the due process, while the social security recipient, under *Nestor*, is deprived of such status and protection. The distinction is not only completely illogical, but is grossly inequitable. Indeed, it appears to run counter to the intent of Congress as reflected by the comments by Senator George, Chairman of the Senate Finance Committee, at the time of the passage of the Social Security Act concerning its purpose and character, as quoted in the *Nestor* dissent, p. 623:

> "'It comports better than any substitute we have discovered with the American concept that free men want to *earn* their security and not ask for doles—that what is due as a matter of *earned right* is far better than a gratuity. . . . . (Emphasis added)
>
> "'*Social Security is not a handout; it is not charity; it is not relief.* It is an *earned right* based upon the contributions and earnings of the individual. As an *earned right*, the individual is eligible to receive his benefit in dignity and self-respect.'" (Emphasis added) 102 Cong. Rec. 15110.

Thus, we must conclude that the concept espoused by the majority in *Nestor*, that one who has contributed to the social security fund and later becomes eligible to receive the benefits provided by the Social Security Act has no indefeasible property right to such benefits, is no longer to be considered a viable and controlling precedent for that principle, in view of the more recent holding in *Goldberg* that a welfare recipient who has made no direct contribution to the fund from which he draws benefits does have a recognizable property right to such benefits and one which is protected by all the safeguards of due process.

## III

The other issue raised by the plaintiff is that the offset provision of Section 224 creates arbitrary discrimination between two classes of disabled workers, essentially indistinguishable from each other except that one is composed of those disabled persons who also receive workmen's compensation benefits and the other is composed of those disabled persons who also receive benefits from private disability insurance plans or tort claim awards, and that on the basis of this difference alone the first class has benefits reduced while the second class has benefits left untouched. In other words, the plaintiff complains that it is patently arbitrary to single out for the purpose of applying the offset *only* those who are receiving workmen's compensation and exclude those who are receiving benefits from other sources. The plaintiff further argues that the offset provision also discriminates between those who were disabled prior to June 1, 1965 and those who become disabled after June 1, 1965.

The defendant, in justification of these discriminatory features of the offset provision, argues that its purpose was to avoid duplication of *public* benefits. If this be its true purpose, it is certainly a laudable one and one with which this Court could wholeheartedly accept. However, the argument is inapplicable here for, as previously shown, workmen's compensation in West Virginia is not a gift from the public largesse, but rather is an entitlement arising from a contractual relationship between employer and employee, sanctioned by law, whereby each gave up a legal right in return for a concomitant legal benefit. That no public funds are involved is made abundantly clear by the provisions of West Virginia Code, 23–3–1. There, it is provided that the Workmen's Compensation Fund shall be supported by "premiums and other funds paid thereto by employers," from which shall be paid all benefits due the employees or their dependents and the expenses of administering the law. No public funds being thus involved, the defendant's argument that plaintiff's workmen's compensation award should be treated as a public benefit obviously becomes quite untenable and must be rejected.

In sum, therefore, it is held that in the circumstances of plaintiff's case, the application of Section 224 cannot be constitutionally applied, since to do so would deprive him of due

process and equal protection of the law under the Fifth and Fourteenth Amendments. The motion of the plaintiff for summary judgment will accordingly be granted and the motion of the defendant for summary judgment will be denied.

An appropriate order may be presented making this opinion a part of the record.

SIDNEY L. CHRISTIE,
*United States District Judge.*

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United States District Court for the Southern District of West Virginia at Bluefield

Civil Action No. 1185

RAYMOND BELCHER, PLAINTIFF

*v.*

ELLIOT L. RICHARDSON, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, DEFENDANT

JUDGMENT ORDER

This cause having been submitted on brief, the transcript of record certified to this Court in the manner prescribed by law, and upon plaintiff's and defendant's motion for summary judgment; and the Court having made its findings of fact and conclusions of law, as appears from its memorandum opinion dated September 10, 1970, in which this Court expressed the opinion that defendant's motion for summary judgment should be denied, and that an order should be entered denying the defendant the right to offset workmen's conpensation payments from the Social Security benefits made to plaintiff, it is therefore

ADJUDGED and ORDERED that the memorandum opinion of the Court, dated September 10, 1970, be and the same is hereby filed and made a part of the record in this action, and that the decision of the Secretary of Health, Education, and Welfare, applying the offset provisions of Section 224 of the Social Security Act be, and the same is hereby reversed, and the proposed

offset by the Secretary against the plaintiff be, and it is hereby denied.

And be it further ADJUDGED and ORDERED:

(1) That counsel for the defendant shall promptly file with the Court a report stating the amount of the initial past due benefits to be paid the plaintiff and/or any ancillary beneficiaries, pursuant to this judgment order. A copy of such report shall be furnished by the defendant to counsel for the plaintiff; and

(2) That counsel for the plaintiff shall, within fifteen (15) days of the entry of this judgment order, file with the Court a verified petition for the approval and allowance of a fee for representing the plaintiff in this Court, pursuant to the provisions of Section 206(b)(1) of the Social Security Act, as amended July 30, 1965, 42 U.S.C.A. 406(b)(1), exhibiting therewith the original or a duplicate-original of any written contract of employment between the attorney and the plaintiff, and in any event, showing (a) what services were rendered by the attorney in the case and specifically the amount of time he devoted to it in this Court; (b) what expenses, if any, were personally incurred by the attorney in the prosecution of the case in this Court and for which he has not been reimbursed by his client; and (c) what sums, if any, have been paid the attorney by the plaintiff or by anyone for the plaintiff for services rendered in this Court. The petition must also contain on affirmation by the attorney that he will neither demand, receive nor accept from the plaintiff or from anyone for the plaintiff, any fee or remuneration for services rendered in this case in this Court other than that approved and allowed by this Court pursuant to such petition.

And this case shall remain upon the docket until such statement of initial benefits shall have been received from the defendant and until the matters arising upon the petition for the approval and allowance of an attorney's fee to counsel for the plaintiff shall have been adjudicated.

Enter: September 14, 1970.

(S) SIDNEY L. CHRISTIE,
*United States District Judge.*

419-403—71——3

United States District Court for the Southern District of West Virginia at Bluefield

[Title Omitted in Printing]

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES PURSUANT TO 28 U.S.C. 1252 AND 2101

Notice is hereby given that Elliot L. Richardson, Secretary of Health, Education, and Welfare, defendant herein acting by and through the United States Attorney for the Southern District of West Virginia, hereby appeals to the Supreme Court of the United States, pursuant to 28 U.S.C. 1252 and 2101, from the Judgment entered in this action on September 14, 1970.

W. WARREN UPTON,

*United States Attorney, Southern District of West Virginia, 4006 Federal Building, 500 Quarrier Street, Charleston, W. Va. 25301.*

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United States District Court for the Southern District of West Virginia at Bluefield

[Title omitted in Printing]

AFFIDAVIT OF SERVICE

STATE OF WEST VIRGINIA,
*County of Kanawha:*

W. Warren Upton, being first duly sworn on his oath deposes and says that he is a resident of the City of Charleston, County of Kanawha, State of West Virginia.

That he is the United States Attorney for the Southern District of West Virginia, at Bluefield, West Virginia, and

That on the 13th day of October, 1970 he mailed, postage prepaid, a copy of Notice of Appeal To The Supreme Court Of The United States, filed in the above-captioned case, to counsel for plaintiff-appellee, as follows:

Mr. Marshall G. West
Attorney At Law
P.O. Drawer 469
Pineville, West Virginia 24874

W. WARREN UPTON,
*United States Attorney, Southern District of West Virgina, 4006 Federal Building, 500 Quarrier Street, Charleston, W. Va. 25301.*

SUBSCRIBED and SWORN to before me, this 13th day of October, 1970.

(S) BETTY JEAN MILLER,
*Notary Public in and for*
*Kanawha County, West Virginia.*

My commission expires September 10, 1973.

# Supreme Court of the United States

OCTOBER TERM, 1970

No. 1091

ELLIOT L. RICHARDSON, SECRETARY OF HEALTH, EDUCATION AND WELFARE, APPELLANT

*v.*

RAYMOND BELCHER

Appeal from the United States District Court for the Southern District of West Virginia.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

MARCH 1, 1971.

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WEST, BLACKSHEAR AND RUNDLE,
ATTORNEYS AT LAW,
Telephone: Area Code 304 732–2321,
P.O. Box 469
PINEVILLE, W. VA. 24874.

*August 2, 1969.*

MARSHALL G. WEST
PAUL D. BLACKSHEAR
RICHARD G. RUNDLE

Re: Raymond Belcher, Wage Earner, A/N 231-05-7239; Juanita Belcher, Wage Earner's Wife; Edward Dewayne Belcher, Dependent Child of Wage Earner; and Raymond Belcher, Jr., Dependent Child of Wage Earner.

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE,
SOCIAL SECURITY ADMINISTRATION,
*Welch, West Virginia.*

DEAR SIR: This office is in receipt of a copy of the decision dated July 19, 1969, by Mr. C. C. Hall, Assistant Director, Bu-

reau of Disability Insurance, making a determination that the wage earner's wife and two dependent children's monthly benefits were reduced to $23.10 per month because of benefits received by the wage earner from the West Virginia Workmen's Compensation Fund in the amount of $203.60 per month.

The wage earner, his wife, and two dependent children object to this decision and respectfully request a hearing thereon before a Hearing Examiner of the Bureau of Hearings and Appeals, and specifically contend as follows:

(1) That the Social Security Act, as amended on June 1, 1965, which requires the Social Security Administration to reduce the benefits of the wage earner, his wife, and dependent children by reason of his right to receive Workmen's Compensation benefits from the Workmen's Compensation Fund, is discriminatory, in that the law does not apply to recipients of disability insurance benefits prior to June 1, 1965;

(2) That the United States Government makes no contribution whatsoever to the West Virginia Workmen's Compensation Fund; that this is a fund created by Acts of the West Virginia Legislature and is financed solely by employers of West Virginia and is considered a part of the cost of doing business in the State of West Virginia, and to which an employee has an absolute right to when he is injured and becomes disabled as a result of said injury;

(3) That the Act of Congress in amending the Social Security Act requiring the Social Security Administration to reduce this wage earner's benefits, as well as those of his wife and dependent children, is unconstitutional and invalid of the claimant, his wife and dependent children's rights to due process of law, in that it amounts to the taking of property rights without due process of law;

(4) That the Social Security Administration did not take into account in the computation of benefits which this wage earner, his wife, and dependent children were entitled to, attorney fees paid out of the Workmen's Compensation benefits, which by contract amounts to 25% of all benefits, it being specifically contended that

the plaintiff does not receive $203.60 per month, but receives only $152.70, after the deduction of attorney fees; and

(5) For other reasons and grounds to be assigned at the date of the hearing granted by the Bureau of Hearings and Appeals in this case.

Please accept this letter as your authority that this office represents the claimant wage earner, his wife, and dependent children; and further that the claimant wage earner, his wife, and dependent children respectfully request a hearing on the matters and things hereinbefore set forth.

Very truly yours,

WEST, BLACKSHEAR & RUNDLE,
(s) MARSHALL G. WEST.

MGW: hc

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE,
SOCIAL SECURITY ADMINISTRATION,
*Bureau of Hearings and Appeals.*

TRANSCRIPT

In the case of Raymond Belcher (claimant), Raymond Belcher (wage earner). (Social Security Account Number 231–05–7239).

Claim for Disability Insurance Benefits (Reduction), Wife's Insurance Benefits (Reduction), Child's Insurance Benefits (Reduction).

Hearing held at Welch, West Virginia on October 9, 1969.

Appearances: Raymond Belcher, Claimant; Marshall G. West, Attorney for Claimant; Juanita Belcher, Claimant's wife.

HERMAN T. BENN,
*Hearing Examiner.*
MARTHA P. CRITZER,
*Hearing Assistant.*

## INDEX OF TRANSCRIPT



[fol. 23] (The following is a transcript of the hearing held before Herman T. Benn, a Hearing Examiner of the Bureau of Hearings and Appeals, Social Security Administration, Department of Health, Education, and Welfare, on October 9, 1969, at Welch, West Virginia, in the case of Raymond Belcher, Claimant and Wage Earner, social security account number 231–05–7239. The claimant, Raymond Belcher, appeared in person, and was represented by his attorney, Marshall G. West. The claimant's wife, Juanita Belcher, was also present at the hearing but did not testify.)

(The hearing commenced at 9:00 a.m., on October 9, 1969.)

OPENING STATEMENT BY HEARING EXAMINER

We are ready to proceed with the hearing on the application of Mr. Raymond Belcher for disability benefits based on his own earnings record, social security account number 231–05–7239. Let the record show that Mr. Belcher is being represented by Mr. Marshall G. West, Attorney at Law, and I would like to state for the record that a petition will be submitted to counsel, and it should be made out after the award has been received. And the 25% that is in the petition represents what will be withheld of the past-due benefits. Any amount that is requested should be stated in a dollar amount. Claimant will have 10 days to respond to a copy of the petition that will be sent to him. The 25%, as you know, only indicates the maximum amount that may be withheld. It does not indicate that that's the only sum that may be charged, but any sum charged must be approved.

Mr. Belcher, before we take testimony in this case, there are a few things I would like to tell you about this type of hearing. The purpose of the hearing is to make certain that a claimant who [fol. 24] has received an unfavorable determination has an opportunity to present his case to a person who has had no previous contact with the case. I am a Hearing Examiner and will make a new independent decision based on the record we make. That record will consist of the testimony that is received and any documents received in evidence, including pertinent documents that may be obtained in the future. This is not a formal proceeding like a court trial. Our purpose is to have the record complete so that the law may be correctly applied to your application. You will be asked some questions, and it is expected you will answer. After I have finished asking my questions, you will have an opportunity to tell me anything else that you think is important in this case, and you will have an opportunity to offer in evidence any documents which you may have.

The testimony is taken under oath, and a record is made by the reporter. When you testify, you should answer the questions directly, accurately, and truthfully. If you do not understand a question, ask that it be repeated or explained. If you do not know the answer, say you do not know, do not guess.

My first knowledge of this case came after you filed your request for hearing. At that time, the file in your case was sent to me. It contains the various documents which have been gathered up to the present time and the previous determinations made. I went [fol. 25] through the file and marked those papers which I thought were material and relevant; that is, those papers which are important in connection with this case. A list of those papers was made. Before the hearing started, your attorney had an opportunity to examine these documents.

HEARING EXAMINER: Are there any objections to the admission of these documents into the evidence?

ATTORNEY: None.

HEARING EXAMINER: There being no objections, the documents set out on the list of Exhibits will be received in evidence, being Exhibits 1 through 13. Do you have any further documentation you would like to submit at this time?

ATTORNEY: Not at this time, Mr. Hearing Examiner.

HEARING EXAMINER: At this point, I will briefly state what appears to be the facts in this case, the determinations made, and issues to be decided. When I have finished reading the statement to you, if you think it is incorrect in any particular, so state. Also, if you have any question about this statement, let me know what your question is.

The file shows that on May 20, 1968, you filed application for disability insurance benefits, stating you became unable to work because of your disability on March 25, 1968. On this same date, your wife, Juanita Belcher, filed application for wife's insurance [fol. 26] benefits and application for child's insurance benefits on behalf of Edward D. Belcher. You were notified on September 30, 1968, of your entitlement to disability benefits and your wife's entitlement to wife's benefits and to child's benefits on behalf of Edward D. Belcher as of October 1968; also, that an adjustment in these benefits would possibly be necessary if you received payments under a Workmen's Compensation plan.

On November 4, 1968, Mrs. Juanita Belcher filed application for child's insurance benefits for Edward D. and Raymond Belcher, Jr., and you were notified on January 27, 1969, of the entitlement of Raymond Belcher, Jr., to child's benefits effec-

tive October 1968; further, that an adjustment would be made in the benefits payable on your social security account because of a required reduction of such benefits due to your receipt of Workmen's Compensation payments.

By letter dated February 10, 1969, your attorney, Mr. Marshall West, requested a reconsideration on your behalf, stating objection to the reduction imposed on the benefits payable on your social security account because of your receipt of Workmen's Compensation payments. However, you were informed of the affirmation of the initial determination by letter dated July 19, 1969. Dissatisfied with this determination, Mr. West requested a hearing on your behalf, which is now being held. Your claim is that you object to the [fol. 27] reduction of the benefits payable on your social security account because of your receipt of Workmen's Compensation payments.

The general issue to be determined is the correctness of the social security disability insurance benefit rate to you, your wife, and your children, Edward D. and Raymond Belcher, Jr., are entitled under the Social Security Act, as amended.

The specific issue is whether the reduction of the benefits payable on your social security account was proper due to your receipt of Workmen's Compensation payments.

Section 216(i) of the Social Security Act provides for the establishment of a period of disability and Section 223 provides for the payment of disability insurance benefits.

Section 224 provides for the reduction of benefits based on disability on account of receipt of Workmen's Compensation.

Now, if you will stand and raise your right hand.

The claimant, RAYMOND BELCHER, having been first duly sworn, testified as follows:

EXAMINATION

By HEARING EXAMINER:

Q. Would you state for the record your name.

A. Raymond Belcher.

Q. You don't have a middle initial?

A. No, sir.

[fol. 28] Q. What is your present address?

A. Clear Fork.

Q. You get the mail at General Delivery, at Clear Fork?

A. Yes.

Q. In other words, you haven't changed your address since you started receiving your benefits?

A. No.

Q. You have a wife by the name of Juanita D. Belcher?

A. Un huh.

Q. You have how many children?

A. Three.

Mrs. BELCHER: We've got one married.

HEARING EXAMINER: You have one who is not dependent on you?

CLAIMANT: Yes, sir; that's right.

Q. About how old is she?

A. She'll be 21 in September.

Q. Are your other two children named Edward D. and Raymond Belcher, Jr.?

A. Yes, sir.

Q. Both under 18 years of age?

A. Yes, sir.

[fol. 29] Q. They are dependent on you at the present time?

A. Yes, sir.

HEARING EXAMINER: Now, counsel, I guess what we will do here is to have you make your statement with regard to your—to the objections you have with regard to the offset. Is that the purpose of the hearing?

ATTORNEY: I'd like to ask Mr. Belcher a question or two before I do that, Mr. Benn.

EXAMINATION

By ATTORNEY:

Q. Mr. Belcher, are you now receiving Workmen's Compensation benefits on a temporary total disability basis?

A. Yes, sir.

Q. You've received trose. I believe, from the date of your injury which occurred on March 25, 1968. Is that correct?

A. Un huh; yes, sir.

Q. That's on the basis of $47 per week?

A. I don't know how much it would be.

Q. The total is $203.60 per month?

A. That's right.

Q. You received total disability benefits under the Workmen's Compensation Office, State of West Virginia, from March 25, 1968, up to the date of this hearing?

[fol. 30] A. Yes, sir.

Q. Are you paying any attorney's fee out of any part of this money to any lawyer, Mr. Belcher?

A. If we get it?

Q. Yes.

A. Yes.

Q. What amount, if any, are you paying out of that to an attorney?

A. 25%.

Q. 25% of the total disability benefits which you receive?

A. I guess, yes, sir; that's right.

Q. Then actually, Mr. Belcher, instead of receiving $203.60 per month, you are receiving that less one-fourth, or 25% of that, or $152.70 per month is actually what you are receiving instead of $203.60. Is that correct?

A. You know I don't understand what you mean.

Q. Well, if you are paying an attorney 25%——

A. No, I ain't paying no attorney now.

Q. You're not paying an attorney now?

A. Not now.

Q. Then you're actually receiving $203.60 a month now?

A. I don't understand.

[fol. 31] Q. $203.60 average. Are you receiving the $203.60 a month now?

A. That's right.

Q. You have been since the date of your injury up to date of this hearing?

A. Yes, sir.

Q. You haven't paid any attorney's fees out of that money at all?

A. No.

HEARING EXAMINER: Mr. West, I wonder if at this point, on this reconsidered determination, you had an opportunity to examine that award determination. Does the wording of this reconsidered determination and the factors as set forth in here represent a true picture?

ATTORNEY: Yes, the statement as set forth in the reconsideration determination, dated July 19, 1969, is a correct statement of the factual picture as I understand it.

By ATTORNEY:

Now, for the record, the claimant, the claimant's wife and the claimant's dependent children object to the reduction of social security benefits which they are entitled to under Section 223 of the Act, based upon a period of disability established for the wage [fol. 32] earner, Raymond Belcher, pursuant to the provisions of Section 216(i) of the Act, on the following grounds: one, that Section 224 of the Social Security Act, as amended, effective June 1, 1965, in applying a formula which takes into consideration benefits received by the claimant from the West Virginia Compensation Act is a fund that is solely supported by contributions of employers in the State of West Virginia who elect to become a member of the fund, that no part of Federal or State tax money is involved in the money paid to the claimant from the Workmen's Compensation Fund of the State of West Virginia. The claimant, working in the mines of West Virginia was injured, is drawing Workmen's Compensation on a temporary total disability basis, and this money is reimbursement to the claimant for his inability to perform his regular occupation on a temporary basis. It is considered part of his employment hazard, and the expense, the fund is a direct part of the cost of doing business in the State of West Virginia by this particular claimant's employer; secondly, that the Social Security Act, as amended, requiring the Department of Health, Education, and Welfare and regulations promulgated pursuant thereto, effective June 1, 1965, is unconstitutional in that it deprives this claimant of a property right which he is entitled to as a matter of law in the State of West Virginia without regard to the application of Section 224 of the [fol. 33] Social Security Act, as amended, and; thirdly, that Congress, in passing Section 224 of the Social Security Act, violated the claimant's constitutional right to receive monies from sources not contributed to by any agency of the Federal government and that such act is discriminatory in the claimants who were disabled prior to June 1, 1965, or had a period of disability established prior to that date, the Act does not apply but only to persons who have a period of disability established after said date, thus discriminating against a particular person

within a particular class; fourthly, that the West Virginia Workmen's Compensation Fund created by acts of the West Virginia Legislature, financed solely by employers of West Virginia, is considered a part of the cost of doing business in the State of West Virginia, and constitutes a property right to any employee who commences work for an employer who has elected to become a member of the Fund and, therefore, it is not earnings or income which should be considered by the Department of Health, Education, and Welfare in applying the formula as set forth in Section 224 of the Social Security Act, as amended; fifthly, that the Act of Congress in amending the Social Security Act in Section 224, requiring the Department of Health, Education, and Welfare to reduce or to apply the formula as set forth in Section 224 of the Social Security Act to wage earners in the State of West [fol. 34] Virginia who are recipients of Workmen's Compensation benefits pursuant to the Workmen's Compensation Act of the State of West Virginia, either on a temporary total disability basis or on a permanent partial disability basis, is invalid and unconstitutional act of Congress in that it deprives this wage earner, the claimant his wife, and dependent children, to property rights without due process of law; and further, that said Act is unconstitutional in that it discriminates against this particular claimant, his wife, and dependent children as singling out a particular claimant for reduction of his benefits when said law does not apply to recipients of benefits under section 216(i) and 223 of the Social Security Act, with a period of disability established prior to June 1, 1965.

HEARING EXAMINER: All right, counsel, do you have the legislation that sets up the Workmen's Compensation Act in West Virginia?

ATTORNEY: Yes, I have that in my office. In fact, I have a little red book and it comes as the whole thing, the latest thing that's out.

HEARING EXAMINER: Is there any part that is pertinent that you could type out that would indicate how the Fund is set up, as you have stated in your statement?

ATTORNEY: Yes, sir.

[fol. 35] HEARING EXAMINER: I wonder if you could prepare a statement and mail it to us so we can include it as an exhibit?

ATTORNEY: I'd be glad to.

HEARING EXAMINER: Further, if you have any documents or you could obtain any that would indicate whether or not the legislature of the State of West Virginia has agreed to permit a reduction—I understand there is such as arrangements have to be entered in by each state—and if they agree, then the Federal government only deducts after that point, and if you could find that law it would be helpful.

If there is nothing else, we will make a decision as soon as possible and send you a copy. This will terminate the hearing.

(The hearing terminated at 9:30 a.m., on October 9, 1969.)

HEARING EXAMINER: The record was reopened on October 31, 1969, to receive in evidence as Exhibit 14 letter by Marshall G. West to Herman T. Benn, dated October 30, 1969, with letter by Forrest J. Bowman, Executive Secretary, Workmen's Compensation Fund, Charleston, dated October 21, 1969. It is so received into evidence. There being nothing further, the record is closed.

CERTIFICATION

I have read the foregoing and hereby certify that it is a true and complete transcription of the testimony recorded by a closed microphone reporter at the hearing held in the above case before Hearing Examiner Herman T. Benn.

(S) Winne W. Friend
WINNIE W. FRIEND,
*Transcriber.*

# EXHIBIT NO. 5

[DEPARTMENT OF HEALTH, EDUCATION AND WELFARE]

[SOCIAL SECURITY ADMINISTRATION]

231-05-7239

09/30/68

| | | | |
|---|---|---|---|
| Raymond & Juanita Belcher | 10/68 | $234.00 | $234.00 |
| General Delivery<br>Clear Fork, W.V. 24822 | DISABILITY, WIFE & CHILD | | |
| Raymond | | $156.00 | ---------- |
| Juanita | | $78.00 | ---------- |
| Juanita Belcher for Edward D | 10/68 | $78.00 | $78.00 |

An adjustment in benefits may be necessary if you receive payments under a workmen's compensation plan. You should notify us immediately when a decision is made on your workmen's compensation claim.

We are sending a copy of this notice to Marshall G. West.

We are sending a copy of this notice to U.M.W.A. Welfare and Retirement Fund.

Section 206(a) of the Social Security Act requires an attorney to obtain authorization from the Social Security Administration before he may charge any fee for his services. If the attorney has not yet done so, he should immediately file a petition for approval of a fee or notify the Administration if no fee is to be charged.

OA-30 (1-68)
ls 9/26/68
Z copy U.M.W.A. Welfare and Retirement Fund
c.c. Marshall G. West, Attorney

## EXHIBIT No. 6

[DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE]

[SOCIAL SECURITY ADMINISTRATION]

231-05-7239 HC

01/27/69

| | | | |
|---|---|---|---|
| Jaunita Belcher | 10/68 | $57.90 | $43.20 |
| For Raymond Belcher, Jr. | | | |
| General Delivery | | | |
| Clear Fork, WV 24822 | | | CHILD |

Due to the entitlement of Raymond your benefits and those payable to Edward have been reduced to $56.90 each effective October 1968. The benefits payable to Raymond have been combined with those payable to Edward.

The law requires us to reduce your benefits because of the receipt of workmen's compensation by the disabled worker on whose social security record the benefits are payable.

To arrive at your benefit amount, we have estimated the disabled worker's actual earnings for the highest 5 consecutive years after 1950, disregarding the limit under social security. From our records we have determined that the disabled worker's highest 5 consecutive years of earnings after 1950 were 1963 to 1967. We have estimated the earnings for this period to be $32,100.00, representing an average monthly wage of $536.00.

You and the children are entitled to receive $23.10 each beginning October 1968. You received $78.00 for October 1968 through December 1968 therefore you have been overpaid. We have withheld the overpayment from the combined check due you and your husband for January 1969. The next check for your husband and you is to be received shortly after February 3, 1969 will be for $14.40. Edward has been overpaid for October 1968 through December 1968. To recover this overpayment we must withhold benefits due the children until March 1969. Shortly after April 3, 1969 they will receive a check for $43.40.

OA-30 (1/68)
PWP (1/69)
E74

Enclosures: SSA-1383, SSA-1420, SSA-1425.

EXHIBIT NO. 8

Give Account No. 231–05–7239 When Writing About Your Application to: Social Security District Office, Welch, West Virginia

DEPARTMENT OF HEALTH, EDUCATION,
AND WELFARE,
SOCIAL SECURITY ADMINISTRATION,
*Baltimore, Maryland 21241.*

Mr. RAYMOND BELCHER,
*General Delivery,*
*Clear Fork, West Virginia 24822.*

JULY 19, 1969.

DEAR MR. BELCHER: In view of your request for reconsideration a complete review of your claim has been made to determine if the original decision was correct under the law. This reconsideration was an independent and thorough re-examination of all the evidence on record about your claim. It was made by a specially trained staff different from the staff that made the original decision.

Upon review it has been determined that the original decision is correct and in accordance with the law and regulations. The enclosed Reconsideration Determination fully explains the decision.

If you believe that the Reconsideration Determination is not correct, you may request a hearing before a hearing examiner of the Bureau of Hearings and Appeals. If you want a hearing you must request it not later than 6 months from the date of this notice. You should make any such request through your local Social Security District Office. Read the enclosed leaflet BHA–1 for a full explanation of your right to appeal.

Sincerely yours,

C. C. HALL,
(S) C. C. Hall
*Assistant Director,*
*Bureau of Disability Insurance.*

Enclosures:
OA–D1227
BHA–1

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE,
SOCIAL SECURITY ADMINISTRATION,
BUREAU OF DISABILITY INSURANCE,
*District Office, Welch, West Virginia.*

RECONSIDERATION DETERMINATION

Name of wage earner or self-employed person, Raymond Belcher; Social Security Account Number, 231–05–7239; Name of claimant, Raymond Belcher; Type of Claim, Disability Insurance Benefits.

DETERMINATION

A period of disability was established for Mr. Raymond Belcher beginning March 25, 1968, based on his application filed May 20, 1968. He became entitled to disability insurance benefits effective October 1968 in the amount of $156.00. His wife and two children became entitled to benefits on his earnings record in the amount of $57.90 each effective October 1968. Due to his receipt of workmen's compensation payments, partial offset was imposed against the benefit amount of his wife and children. Mr. Belcher was so notified on January 27, 1969. On February 10, 1969, his attorney, Mr. Marshall G. West, requested reconsideration on his behalf because they do not believe that the workmen's compensation should be applied against their social security benefits.

The Social Security Act, as amended, provides that benefits payable to a disabled beneficiary, and to any member of his family entitled to benefits on his social security account, will be reduced for any month before the month the wage earner attains age 62 for which he is receiving a periodic workmen's compensation benefit. This provision is effective with respect to periods of disability which began after June 1, 1965.

Workmen's compensation, for offset purposes, are those payments made to a worker because of a work-related injury or disease, under a State or Federal workmen's compensation law or plan.

On April 30, 1969, the workmen's compensation Board of West Virginia advised that Mr. Belcher was entitled to workmen's compensation of $47.00 per week beginning March 26, 1968. Since Mr. Belcher's workmen's compensation is being paid under the State workmen's compensation law as a result of his work-related disability, such compensation must be applied for offset purposes.

The Act limits total benefits payable to an individual and his dependents under both programs (workmen's compensation and social security) to the higher of 80 per cent of the individual's average current earnings, or the total benefits to which the individual and his dependents are entitled under social security.

The average current earnings are the higher of (1) the average monthly wage on which disability amount is based or (2) the average monthly wage based on the wage earner's five consecutive years of highest earnings after 1950.

In Mr. Belcher's case, it was determined that his highest five consecutive years of earnings after 1950 were 1963 through 1967, in which he had an average monthly wage of $536.00 Eighty percent of $536.00 is $428.80. Thus, $428.80 is the highest amount Mr. Belcher and his family may receive from social security benefits and workmen's compensation payments.

Since the amount of workmens compensation Mr. Belcher receives each month amounts to $203.60, he and his family may receive a total of $225.30 in social security benefits. Mr. Belcher receives $156.00 and his wife and each of the three children receive $23.10 a month.

The reduction of Mr. Belcher's and his familys social security benefits due to his receipt of workmen's compensation payments is in accordance with the Social Security Act, as amended, and is affirmed on reconsideration.

AUTHORITY: Section 224 of the Social Security Act, as amended.

JOHN E. BLUETT,
*Director, Division of Reconsideration,*
*Bureau of Disability Insurance.*

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE,
*Social Security Administration,*
*Bureau of Hearings and Appeals.*

HEARING EXAMINER'S DECISION

In the case of Raymond Belcher, Claimant; Juanita Belcher, Claimant; Juanita Belcher on behalf of Edward & Raymond Belcher, Jr., Claimants.

Raymond Belcher (Wage Earner). (Social Security Account Number 231–05–7239).

Claim for Disability Insurance Benefits (Reduction), Wife's Insurance Benefits (Reduction), Child's Insurance Benefits (Reduction).

This case comes before the Hearing Examiner upon a request for hearing dated August 4, 1969 filed on behalf of Mr. Raymond Belcher, the claimant, by Mr. Marshall G. West, Attorney at Law. The request was for an appeal from a determination of the Social Security Administration with regard to the reduction imposed on the benefits payable on claimant's social security account because of his receipt of workmen's compensation benefits. After due notice, a hearing was held on October 9, 1969 at Welch, West Virginia. The claimant appeared in person and was represented by Mr. Marshall G. West, Attorney at Law, who appeared and participated in the hearing. Also appearing was Mrs. Juanita D. Belcher, wife of claimant.

On May 20, 1968 applications were filed for disability insurance benefits, wife's, and child's benefits for Edward D. Belcher. By letter dated September 30, 1968 notice was given of the award of the benefits for which the said applications were filed with entitlement to payments as of October 1968. Subsequently, application for child's insurance benefits for an additional child, Raymond Belcher, Jr., was filed on November 4, 1968. By letter dated January 27, 1969 notice was given of the entitlement to benefits for the last-stated child also to begin October 1968. Notice was also given that an adjustment of the above-stated benefits would be made, as required under the Act, on the ground that the said wage earner received workmen's compensation payments.

By letter dated February 10, 1969 Mr. Marshall West, as counsel for claimant, requested reconsideration, stating as grounds for reconsideration his objection to the reduction im-

posed upon the benefits payable on said wage earner's social security account because of the receipt of workmen's compensation payments. However, the initial determination was affirmed upon reconsideration and claimant was so notified by letter dated July 19, 1969, thereupon the said request for hearing was filed.

STATEMENT OF ISSUES AND APPLICABLE LAW

The general issue before the Hearing Examiner is whether under the facts of this case the benefits payable on the said wage earner's account are required to be adjusted under the Social Security Act, as amended.

The specific issue is whether the reduction of the benefits payable on the said wage earner's social security account was proper based on the ground that said wage earner received Workmen's Compensation payments for the same period he is entitled to and receives social security disability insurance benefits.

Section 224(a) of the Social Security Act as amended provides, in effect, and as pertinent here, for the reduction of social security benefits payable to a disabled beneficiary and to members of his family entitled on his account where the disabled beneficiary is also entitled to workmen's compensation. The provisions for reduction apply only with respect to benefits payable on the social security account of a disabled beneficiary for months after December 1965, where the period of disability began after June 1, 1965. The reduction of benefits is applicable to benefits payable only for months prior to the disabled beneficiary's attainment of age 62, and is applicable only for months after the month the Social Security Administration receives notice of the receipt of workmen's compensation by the beneficiary. Offset reductions are first applied to the dependents' benefits. Any excess still to be offset is taken from the wage earner's benefit.

Where benefits are subject to reduction because of the receipt of workmens' compensation, the law provides that total benefits payable on the social security account of a disabled beneficiary shall be reduced by the amount which combined social security benefits and workmen's compensation exceed the higher of:

1. 80 percent of the disabled beneficiary's average

monthly wage as computed under the Social Security Act, or

2. total social security benefits for which there is entitlement on the disabled beneficiary's account.

SUMMARY OF THE FACTS INVOLVED

Claimant alleges his date of birth to be June 3, 1918. He is married and lives near Clear Fork, West Virginia, with his wife, Juanita, and two sons, Edward and Raymond, Jr. Claimant's representative, Marshall G. West, Esquire, Attorney at Law, stated at the hearing the factual background as set out in the reconsideration of determination statement attached to the notice of said determination dated July 19, 1969, and included in the evidence as exhibit 8. The following excerpt is from the said statement: A period of disability was established for the claimant, Mr. Belcher, beginning March 25, 1968, based on his application filed May 20, 1968. He became entitled to disability insurance benefits effective October 1968 in the amount of $156.00 monthly. His wife and two children became entitled to monthly benefits on his earnings record in the amount of $57.90 each, effective October 1968.

On April 30, 1969, the Workmen's Compensation Board of West Virginia advised the said claimant of his entitlement to workmen's compensation in the amount of $47.00 per week beginning March 26, 1968. Due to his receipt of said Workmen's compensation benefits, notice was given by letter dated January 27, 1969, which is included in the evidence as exhibit 6, that an offset was being imposed against the benefits being received by claimant's wife and two children.

It is further set out in said statement that workmen's compensation, for offset purposes, are those payments made to a worker because of a work-related injury or disease, under a state or federal workmen's compensation law or plan.

COUNSEL'S STATEMENT REGARDING THE OFFSET

Mr. Marshall West, attorney for claimant, in effect, made the following argument in support of claimant's position with regard to offset required under the Act when a claimant is receiving workmen's compensation under a state or federal plan and for the same period he is entitled to and receives disability insurance benefits:

The statement as set forth in the reconsideration determination dated July 19, 1969 is a correct statement of the factual picture as I understand it. Now, for the record, the claimant, the claimant's wife, and the claimant's dependent children object to the reduction of social security benefits which they are entitled to under Section 223 of the Act, based upon a period of disability established for the wage earner, Raymond Belcher, pursuant to the provisions of Section 216(i) of the Act on the following grounds: *one,* that Section 224 of the Social Security Act, as amended, effective June 1, 1965, in applying a formula which takes into consideration benefits received by the claimant from the West Virginia Compensation Act is a fund that is solely supported by contributions of employers in the State of West Virginia, who elect to become a member of the fund, that no part of federal or state tax money is involved in the money paid to the claimant from the Workmen's Compensation Fund of the State of West Virginia. The claimant working in the mines of West Virginia was injured, is drawing workmen's compensation on a temporary total disability basis, and this money is reimbursement to the claimant for his inability to perform his regular occupation on a temporary basis. It is considered part of his employment hazard, and the expense, the fund is a direct part of the cost of doing business in the State of West Virginia by this particular claimant's employer; *secondly,* that the Social Security Act, as amended, requiring the Department of Health, Education and Welfare and regulations promulgated pursuant thereto, effective June 1, 1965, is unconhtitutional in that it deprives this claimant of a property right which he is entitled to as a matter of law in the State of West Virginia, without regard to the application of Section 224 of the Social Security Act, as amended, and; *thirdly,* that Congress, in passing Section 224 of the Social Security Act, violated the claimant's constitutional right to receive monies from sources not contributed to by any agency of the federal government, and that such act is discriminatory in that claimants who were disabled prior to June 1, 1965 or had a period of disability established prior to that date, the Act does not apply, but only to persons who have a period of disability established after said date, thus discriminating against a particular person within a particular class; *fourthly,* that the West Virginia Workmen's Compensation Fund created by acts of the West Virginia Legislature, financed solely by employers of West

Virginia, is considered a part of the cost of doing business in the State of West Virginia, and constitutes a property right to any employee who commences work for an employer who has elected to become a member of the fund; and therefore, it is not earnings or income which should be considered by the Department of Health, Education and Welfare in applying the formula as set forth in Section 224 of the Social Security Act, as amended; *fifthly*, that the Act of Congress in amending the Social Security Act in Section 224, requiring the Department of Health, Education and Welfare to reduce or to apply the formula as set forth in Section 224 of the Social Security Act to wage earners in the State of West Virginia who are recipients of workmen's compensation benefits pursuant to the Workmen's Compensation Act of the State of West Virginia, either on a temporary total disability basis or on a permanent partial disability basis, is invalid and unconstitutional act of Congress in that it deprives this wage earner, the claimant, his wife, and dependent children, to property rights without due process of law; and further, that said Act is unconstitutional in that it discriminates against this particular claimant, his wife, and dependent children as singling out a particular claimant for reduction of his benefits when said law does not apply to recipients of benefits under Section 216(i) and 223 of the Social Security Act with a period of disability established prior to June 1st 1965.

RATIONALE

The statutory law with regard to offset, as pertinent here, has already been set out hereinabove. The amplifying regulation pertaining to offset, Section 404.408 of Social Security Regulations No. 4, provides, in effect, that Section 224 of the Act, as amended, requires that benefits payable to a disabled beneficiary and to any member of his family on his social security account be reduced for any month before the month the wage earner attains age 62 for which the wage earner is receiving a periodic workmen's compensation benefit. This provision is effective with respect to periods of disability which began after June 1, 1965.

The said regulation further provides that workmen's compensation, for offset purposes, are those payments made to a worker because of a work-related injury or disease, under a state or federal workmen's compensation law or plan.

In addition to the above, the said amplifying regulation provides, in effect and as pertinent here, that the said Act limits total benefits payable to an individual and his dependents under both programs (workmen's compensation and social security) to the higher—80 percent of the individual's average current earnings, or the total benefits to which the individual and his dependents are entitled under social security.

The said regulation further provides, in effect, that no reduction is made if the workmen's compensation law or plan involved provides for the reduction of such periodic benefits when anyone is entitled to a benefit under Title II of the Act on the basis of the earnings record of an individual entitled to a disability insurance benefit under Section 223 of the Act.

The thrust of claimant's position is not to the correctness of the computation, but it is that the Act, insofar as it requires the above-stated offset, denies claimant and his beneficiaries a property right to which they are entitled, thereby violating a constitutional right.

The Examiner is not aware of any provision of law upon which jurisdiction is given his office to rule on this issue. He is, therefore, confining his decision to the issue of whether the action taken with regard to the offset is in accordance with the Social Security Act, as amended.

FINDINGS OF THE HEARING EXAMINER

The Hearing Examiner has carefully considered the entire record and, based upon a preponderance of the creditable evidence and applicable law, makes the following specific findings:

1. The claimant has not attained age 62 years.

2. A period of disability was established for claimant beginning March 25, 1968, based on his application filed May 20, 1968, and he and his dependents (wife and two children) became entitled to benefits on his earnings record as of October 1968.

3. Claimant became entitled to and began to receive workmen's compensation payments as of March 26, 1968 under the West Virginia State law.

4. The evidence fails to establish that the West Virginia law or plan has any provision for reduction of benefits to which an individual is otherwise entitled under its workmen's compensation law when there is an entitlement by such individual to disability benefits under Section 223 of the Act.

DECISION

It is the decision of the Hearing Examiner that the reduction or offset of the benefits based upon the claimant's social security account due to receipt by him of workmen's compensation payments is in accordance with Section 224 of the Social Security Act, as amended; and, therefore, it is correct under the law. The determination issued by the Social Security Administration in this case will continue in effect.

(S) Herman T. Benn
HERMAN T. BENN,
*Hearing Examiner,*
*920 South Jefferson Street,*
*Roanoke, Virginia 24016.*

Date OCT. 31, 1969.

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WEST, BLACKSHEAR AND RUNDLE,
ATTORNEYS AT LAW,
TELEPHONE: AREA CODE 304 732–2321,
P.O. BOX 469,
PINEVILLE, W. VA. 24874,

MARSHALL G. WEST
PAUL D. BLACKSHEAR
RICHARD G. RUNDLE

*November 3, 1969.*

Re: Raymond Belcher, Claimant; Juanita Belcher, Claimant; Juanita Belcher on behalf of Edward & Raymond Belcher, Jr., Claimants.

DEPARTMENT OF HEALTH, EDUCATION & WELFARE,
SOCIAL SECURITY ADMINISTRATION,
*Welch, West Virginia.*

DEAR SIR: The above-captioned claimants respectfully object to the decision of Mr. Herman T. Benn, Hearing Examiner of the Bureau of Hearings and Appeals, dated October 31, 1969, denying the re-instatement of reduction or offset of the benefits based upon the claimant's Social Security account due to receipt by him of Workmen's Compensation benefits pursuant to Section 224 of the Social Security Act, as amended.

The claimants respectfully request a review of the Hearing Examiner's decision by the Appeals Council of the Bureau of Hearings and Appeals.

Please consider this letter as your authority that the above-captioned claimants respectfully request a review as aforestated, and that this office represents the claimant.

Very truly yours,

WEST, BLACKSHEAR & RUNDLE,
(S) Marshhall G. West
MARSHALL G. WEST.

MGW: dw

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DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE,
SOCIAL SECURITY ADMINISTRATION,
BUREAU OF HEARINGS AND APPEALS,
P.O. BOX 2518, WASHINGTON, D.C. 20013,

*January 20, 1970.*

Refer to: 231–05–7239
HA:C

ACTION OF APPEALS COUNCIL ON REQUEST FOR REVIEW

Mr. RAYMOND BELCHER,
*General Delivery,*
*Clear Fork, West Virginia 24822.*

DEAR MR. BELCHER: Your request for review of the hearing examiner's decision has been carefully considered by the Appeals Council. The Council's consideration of your request has included all the evidence in your case, the law and regulations applicable to your claim, the hearing examiner's evaluation of the facts and the reasoning in his decision, and your reasons for believing your claim should be allowed.

The Appeals Council has concluded that the decision of the hearing examiner is correct. Further action by the Council would not, therefore, result in any change which would be of advantage to you. Accordingly, the hearing examiner's decision stands as the final decision of the Secretary in your case.

If you desire a review of the hearing examiner's decision by a court you may commence a civil action in the district court of the United States in the judicial district in which you reside *within sixty (60) days* from this date. See section 205(g) of the Social Security Act, as amended (section 405(g), Title 42, United States Code). If such action is commenced, the Secretary of Health, Education, and Welfare is the proper defendant.

Sincerely yours,

JOHN T. ALLEN,
*Member, Appeals Council.*
LUCILLE V. COVEY,
*Member, Appeals Council.*

cc:
Marshall G. West, Esq.

U.S. GOVERNMENT PRINTING OFFICE: 1971

# In the Supreme Court of the United States

OCTOBER TERM, 1970

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NO. ——

ELLIOT L. RICHARDSON, SECRETARY OF HEALTH, EDUCATION AND WELFARE, APPELLANT

*v.*

RAYMOND BELCHER

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*ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA*

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## JURISDICTIONAL STATEMENT

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### OPINION BELOW

The memorandum opinion and order of the United States District Court for the Southern District of West Virginia (App. A, *infra,* pp. 11–21) are not yet reported.

### JURISDICTION

The judgment of the district court declaring 42 U.S.C. 424a unconstitutional as applied to appellee Belcher was entered on September 14, 1970 (App. A, p. 21). A notice of appeal was filed on October 13, 1970 (App. A, pp. 21–23). The jurisdiction of this Court is conferred by 28 U.S.C. 1252: *Fleming* v. *Rhodes,* 331 U.S. 100; *Flemming v. Nestor,* 363 U.S. 603.



411-537—70——1

## QUESTION PRESENTED

Whether the provision in the Social Security Act requiring the reduction of social security disability benefits because of the simultaneous receipt of state workmen's compensation benefits is constitutional.

## STATUTES AND REGULATIONS INVOLVED

Section 424a of Title 42, United States Code (Supp. V), together with the relevant Department of Health, Education and Welfare regulations, are set forth in Appendix B, *infra*, pp. 24–41.

## STATEMENT

Appellee Raymond Belcher is a resident of West Virginia who has had his social security disability benefits reduced under Section 224 of the Social Security Act, 42 U.S.C. (Supp. V) 424a, because of his simultaneous receipt of periodic workmen's compensation benefits. He instituted this action for review of the administrative decision, seeking a declaration that the section is unconstitutional and inapplicable to him. This is a direct appeal from the order of a single-judge district court holding Section 224 unconstitutional and inapplicable to the appellee.

Section 224(a) provides that for any month in which an individual under age 62 is entitled to both social security benefits and periodic workmen's compensation benefits under any federal or state law, such individual's social security benefits shall be reduced by the amount by which the total benefits received under the social security and workmen's compensation programs for that month exceeds the higher of:

(a) 80 percent of the individual's "average current earnings" [1] or (b) the total of certain other designated disability benefits. Section 224(b) provides that, should such an individual receive a lump sum settlement as a substitute for or a commutation of periodic workmen's compensation benefits, the reduction "shall be made at such time or times and in such amounts as the Secretary finds will approximate as nearly as practicable the reduction prescribed by subsection (a)."

The facts of this case are not in dispute. Belcher was awarded disability insurance benefits. Because he was also receiving workmen's compensation benefits under West Virginia law, his disability benefits were reduced as required by Section 224.[2] After exhausting his administrative remedies, Belcher instituted the

[1] An individual's "average current earnings" is defined as the larger of the average monthly wage used for purposes of computing his benefits under 42 U.S.C. 423, or one-sixtieth of his total wages and self-employment income for the five consecutive years after 1950 when they were highest. The 1968 amendments (Pub. L. 90-248, Title I, Sec. 159(a), 81 Stat. 869) changed this clause to provide that when an individual's wages and self-employment income for the five consecutive years during which they were highest are used to compute his "average current earnings," then his actual earnings, rather than those earnings creditable for purposes of social security (which have an upper limit), are to be used.

[2] Beginning in October, 1968, Belcher was awarded monthly social security disability insurance benefits of $156.00 for himself and $57.90 each for his wife and two children, for a total of $329.70 per month. But in January, 1969, Belcher was notified that $104.40 was being withheld from such monthly social security benefits because he was receiving $47.00 a week, or $203.60 a month in workmen's compensation, thereby reducing his monthly federal payments to $225.30 (Admin. Tr. 9, 12, 25-27, 29).

present action, alleging that Section 224 is unconstitutional because: (1) it discriminates irrationally between recipients of workmen's compensation benefits whose social security benefits are reduced, and all other recipients of benefits or awards, such as private insurance beneficiaries and successful tort plaintiffs, whose benefits are not reduced and (2) it deprives him and his family of property, in the form of social security benefits for which he has at least partially paid through social security taxes, without due process of law.[3] The district court held that Section 224 unconstitutionally discriminates against Belcher by requiring the reduction of his social security benefits and that it deprives him of property without due process of law (App. A. pp. 11–19).

THE QUESTION IS SUBSTANTIAL

1. In this case the district court invalidated a significant provision of a major Act of Congress designed to effectuate proper legislative ends.[4] Every

[3] Belcher also alleged that Section 224 was unconstitutional because it arbitrarily required the reduction of his social security benefits without taking account of attorney's fees paid by him in connection with his workmen's compensation claim. The district court did not rule on this allegation. At the administrative hearing, however, Belcher testified that he was not at that time paying any attorney's fee out of the workmen's compensation benefits he had been receiving (Admin. Tr. 30–31). Moreover, the Secretary will take into account the payment of such expenses, if they are identifiable, in computing the reduction. See 20 C.F.R. 404.408(d), App. B, *infra*, p. 34.

[4] See the Government's Motion to Affirm in *Bartley* v. *Richardson*, No. 703, October Term, 1970, pp. 6–12, presently pending before this Court on appeal from a district court decision upholding the constitutionality of the same provision.

other court which has considered this question has upheld the provision.[5]

The need for this Court to determine the constitutionality of Section 224 is underscored by several factors. The large number of decided and pending cases in which the statute's constitutionality has been challenged (see note 5, *supra*) demonstrates the widespread significance of the question.[6] Now that a court has invalidated the provision, further challenges are likely to be made; all fifty states, the District of Columbia, Puerto Rico and the United States have workmen's compensation laws. Since in many jurisdictions such laws have characteristics

[5] In addition to *Bartley*, *supra* note 4, the constitutionality of Section 224 has been upheld in the following cases: *Nieves* v. *Secretary of HEW*, 1 CCH Unemployment Ins. Rptr., Fed. Matter No. 15,479 (Puerto Rico, 1969); *Gambill* v. *Finch*, 309 F. Supp. 1 (E.D. Tenn.); *Barber Lofty* v. *Cohen* (E.D. Mich., Civil No. 30916, decided March 25, 1970, pending before the Sixth Circuit, No. 20,484); *Bailey* v. *Finch*, 312 F. Supp. 918 (N.D. Miss); *Johnney Benjamin* v. *Finch* (E.D. Mich., Civ. No. 32816, decided May 26, 1970, pending before the Sixth Circuit, No. 20,714); *Louis E. Miley* v. *Finch* (E.D. Mich., Civ. No. 33560, decided June 12, 1970); *Edward O. Gooch* v. *Finch* (S.D. Ohio, Civ. No. 6840, decided July 13, 1970).

The following cases involving challenges to the constitutionality of Section 224 are pending: *Sheets* v. *Finch* (S.D. W.Va., Civil No. BK 69-3); *Rodatz* v. *Finch* (E.D. Ill., Civil No. 69-170); *Copeland* v. *Finch* (W.D. Okla., Civil No. 69-363); *Wren* v. *Finch* (W.D. Mich., Civil No. 6171); *McAlonan* v. *Finch* (W.D. Mich., Civil No. 6269).

[6] The fiscal strain on the social security fund that would be imposed by the invalidation of Section 224 is significant. The Social Security Administration estimates that as a result of the statute's offset provision, the reduction in benefits throughout the country in 1970 will be $28,610,638.

similar to those of West Virginia relied upon by the court below—namely, that in that state workmen's compensation is a private rather than a public right, since it depends upon a contract [7]—the decision below, if followed in those areas, would result in the invalidation of Section 224 in a substantial portion of the country.

The court's alternative ground for invalidating the statute—that it deprives appellee of property rights without due process of law—poses an even greater threat to Section 224, and, indeed, to other important provisions of the Social Security Act. For, should a claimant's statutory right to disability benefits be deemed to be an indefeasible property right not subject to any statutory limitations, doubt would be cast upon other important provisions of the Act, such as those requiring the reduction of an individual's benefits because of his excess earnings (42 U.S.C. 403(b)) and the limitation of benefits to children adopted by an individual after he becomes entitled to benefits (42 U.S.C. 402(d)).

2. Section 224 satisfies the requirements of due process and equal protection; neither of the grounds

[7] Under the workmen's compensation laws of all jurisdictions the employer must pay for at least a portion, if not all, of the benefits, either through contributions to the state-regulated fund, as in West Virginia, or through payment of premiums to its insurance carrier. Out of fifty-three total jurisdictions, including the states, the District of Columbia, Puerto Rico and the United States, twenty-nine require private employers to participate in the workmen's compensation system and twenty-four allow private employers to elect not to participate, on penalty of loss of their common law defenses. 3 Larson, *Workmen's Compensation*, Table 7 at pp. 522–523 (1968) and Supp. 1970, p. 117.

relied upon by the court below in striking it down is well founded.

We have fully discussed the contention that Section 224 discriminates unconstitutionally against recipients of workmen's compensation benefits in our motion to affirm in *Bartley* v. *Richardson, supra,* note 4, to which we refer the Court. We add here only that the reliance of the court below on the characterization of West Virginia's workmen's compensation benefits as private in nature is misguided.[8] Our argument in support of Section 224 in no way depends upon whether state workmen's compensation benefits are derived from public or private sources. Instead our argument is that in effectuating the purposes of the social security disability system—namely, rehabilitating the disabled worker and encouraging him to return to productive work as soon as he is able, and preventing the erosion or repeal of state workmen's compensation systems[9]—Congress rationally chose to reduce the so-

[8] Even on its own terms, the court's conclusion that workmen's compensation benefits are "private" is questionable. As in all other jurisdictions, both state and federal, the workmen's compensation system in West Virginia exists solely by virtue of state legislation (W. Va. Code, Chap. 23 (1966 ed.). Moreover, the West Virginia system is administered by a state commissioner. (W. Va. Code, § 23–1–1) and operates solely because of the sanctions imposed by state law. Thus, while private employers may elect not to participate in the system, employers so deciding must provide their own method of compensation, which must be approved by the commissioner, and post sufficient bond to insure payment of compensation and expenses to their injured employees (W. Va. Code, § 23–2–9).

[9] See our motion to affirm in *Bartley*, pp. 6–12.

cial security payments to recipients of duplicating benefits.[10]

3. The district court also held Section 224(a) unconstitutional on the ground that the statute deprives Belcher of a property right—his disability benefits—without due process of law. In support of this holding, the court cited *Goldberg* v. *Kelly*, 397 U.S. 254, which held that the welfare benefits of an individual recipient cannot be terminated without an evidentiary hearing. According to the court below, the reasoning of *Goldberg* applies equally to social security disability benefits, and, consequently, Section 224 cannot constitutionally reduce Belcher's right to receive social security disability benefits. However, even if *Goldberg* were extended to apply to the disability benefits in question here,[11] that case dealt only with the procedural rights of a person whose benefits are terminated

[10] As we explain in our motion to affirm in *Bartley*, p. 12, the fact that Congress might have gone further than it did, so as to apply the offset provisions to recipients of benefits from sources such as private insurance or tort claim recovery, does not invalidate the distinction questioned here. Legislative reform "may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind." *Williamson* v. *Lee Optical Co.*, 348 U.S. 483, 489.

[11] In *Flemming* v. *Nestor*, 363 U.S. 603, this Court sustained the statutory termination of the social security old-age benefits of an alien deported because of his membership in the Communist party, adding that an individual who has become eligible to receive benefits under the Social Security Act does not have an indefeasible property right to those benefits. According to the district court, *Goldberg* implicity overruled *Nestor*, and the court considered this to be dispositive of the instant case. As stated in the text, however, *Goldberg* did not deal with the validity of rational statutory distinctions, and the opinion did not even refer to *Nestor*.

because of alleged failure to meet statutory qualifications. *Goldberg* has no bearing upon the substantive validity of rational statutory limitations such as the qualification in Section 224 held invalid by the court below.

## CONCLUSION

For the foregoing reasons, probable jurisdiction should be noted.

Respectfully submitted.

ERWIN N. GRISWOLD,
*Solicitor General.*
CARL EARDLEY,
*Acting Assistant Attorney General.*
RICHARD B. STONE,
*Assistant to the Solicitor General.*
ROBERT V. ZENER,
JAMES C. HAIR, JR.,
*Attorneys.*

DECEMBER 1970.

411-537—70——2

## APPENDIX A

In the United States District Court for the Southern District of West Virginia at Bluefield

Civil Action No. 1185

RAYMOND BELCHER, PLAINTIFF

*v.*

ELLIOT L. RICHARDSON, SECRETARY OF HEALTH, EDUCATION AND WELFARE, DEFENDANT

CHRISTIE, *District Judge:*

This is an action under Section 205(g) of the Social Security Act, 42 U.S.C.A. 405(g), to review a final decision of the Secretary of Health, Education and Welfare. A decision by a hearing examiner on October 31, 1969, became the final decision of the Secretary on January 20, 1970, when it was affirmed by the Appeals Council. The matter is before the Court on the cross motions of the parties for summary judgment pursuant to Rule 56.

The plaintiff filed an application for disability insurance benefits on May 20, 1968, alleging that he became unable to work on March 25, 1968, as the result of an injury. On May 20, 1968, his wife and children also applied for benefits under the Act. The Secretary having determined that plaintiff was disabled within the meaning of the Act, all applicants were awarded benefits on September 30, 1968, such benefits to begin with the month of October 1968.

Later, plaintiff received an award of $203.60 per month from the Workmen's Compensation Fund of West Virginia as the result of a work-related injury.

Upon learning of this award, the Social Security Administration applied the "offset" provisions of Section 224 of the Social Security Act, 42 U.S.C.A. 424(a).[1]

On February 10, 1969, plaintiff's attorney requested a reconsideration of the offset reductions which the

[1] Section 224 of the Social Security Act, 42 U.S.C.A. Section 424, as amended, July 30, 1965 and January 2, 1968, provides:

"(a) If for any month prior to the month in which an individual attains the age of 62—

"(1) such individual is entitled to benefits under section 223, and

"(2) such individual is entitled for such month, under a workmen's compensation law or plan of the United States or a State, to periodic benefits for a total or partial disability (whether or not permanent), and the Secretary has, in a prior month, received notice of such entitlement for such month, the total of his benefits under section 223 for such month and of any benefits under section 202 for such month based on his wages and self-employment income will be reduced (but not below zero) by the amount by which the sum of—

"(3) such total of benefits under sections 223 and 202 for such month, and

"(4) such periodic benefits payable (and actually paid) for such month to such individual under the workmen's compensation law or plan,

exceeds the higher of—

"(5) 80 per centum of his 'average earnings', or

"(6) the total of such individual's disability insurance benefits under section 223 for such month and of any monthly insurance benefits under section 202 for such month based on his wages and self-employment income, prior to reduction under this section.

In no case shall the reduction in the total of such benefits under sections 223 and 202 for a month (in a continuous period of months) reduce such total below the sum of—

"(7) the total of the benefits under section 223 and 202, after reduction under this section, with respect to all persons entitled to benefits on the basis of such individual's wages and self-employment income for such month which were determined for such individual and such persons for the first month for which reduction under this section was made (or which would have

Administration rejected on July 19, 1969. Thereupon, said attorney requested a hearing, held October 9, 1969, at which he presented argument supporting his claim that Section 224 deprived plaintiff and his family of a property right without due process of law and that it was discriminatory inasmuch as it discriminated unfairly between persons of a similar class. On October 31, 1969, the hearing examiner issued his opinion upholding the legality of the reduction of benefits. This decision became the final decision of the Secretary on January 20, 1970, when it was affirmed by the Appeals Council. Thereupon, plaintiff timely filed the instant action in this court.

I

As previously noted (footnote 1), Section 224 provides for a reduction in social security disability benefits for such time as the claimant receives workmen's compensation benefits for either total or partial disability. Workmen's compensation laws generally provide compensation to employees for loss resulting from industrial accidents and disease growing out of or resulting from their employment. The need for such a system arose out of conditions produced by modern industrial development and was premised upon the idea that the common-law rule of liability for personal injuries incident to the operation of industrial enterprises, which was based upon the negligence of the employer, with its defenses of contributory negligence, fellow servant's negligence, and assumption of risk, was outmoded by modern conditions.

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been so determined if all of them had been so entitled in such first month), and

"(8) any increase in such benefits with respect to such individual and such persons, before reduction under this section, which is made effective for months after the first month for which reduction under this section is made."

West Virginia's Workmen's Compensation Law is found in Chapter 23 of the West Virginia Code. The law creates a "Workmen's Compensation Fund" which is sustained by contributions made to it by the employers who voluntarily elect to come under the provisions of the law, such contributions being based upon a percentage of the gross wages of their employees. The employees make no direct monetary contributions to the fund and the system is state-operated. Basically, the law takes from the employee his common-law right to sue his employer for damages for negligence in return for payment from the fund of limited or scheduled benefits for disability or death resulting from or growing out of the employment relationship, regardless of any fault of the employer.

In West Virginia the relation of employer and employee, under the law, is termed contractual in nature, the statute becoming an integral part of the contract of employment, and imposing upon the employer and employee, respectively, a limitation of rights and liabilities. *Gooding* v. *Ott,* 77 W. Va. 487, 87 S.E. 862; *Lancaster* v. *State Compensation Comr.,* 125 W. Va. 190, 23 S.E. 2d 601. Thus, in no sense of the word can one's workmen's compensation benefits be termed a gratuity; rather they must be treated as a contractual entitlement. So it is seen that the issue before this Court as to this aspect of the case is whether or not Section 224 of the Social Security Act, requiring reduction in plaintiff's social security benefits in proportion to the amount of his workmen's compensation benefits, may be constitutionally applied.

## II

It cannot be seriously contended that the Social Security Act itself is unconstitutional for its constitutionality has been upheld in a long line of cases.

*Helvering* v. *Davis,* 301 U.S. 619 (1937). See also *Steward Machine Company* v. *Davis,* 301 U.S. 584 (1937), and *Carmichael* v. *Southern Coal and Coke Company,* 301 U.S. 495 (1937). It is equally well settled that entitlement to social security benefits is subject to all conditions set out in the Social Security Act under which benefits are to be paid. *Flemming* v. *Nestor,* 363 U.S. 603 (1960); *Gruenwald* v. *Gardner,* 396 F. 2d 591 (2d Cir. 1968), cert. den. *Gruenwald* v. *Cohen,* 393 U.S. 982 (1968); *Price* v. *Flemming,* 168 F. Supp. 392 (D. Ct. N.J. 1968), affirmed 280 F. 2d 956 (3d Cir. 1960), cert. den. 365 U.S. 817 (1961).

Notwithstanding, as previously noted, plaintiff urges that the offset provision of Section 224 deprives him of his property (benefits) without due process of law. The answer would seem to hinge upon whether the plaintiff has such an indefeasible right or interest in his social security benefits that the concept of due process precludes application of the offset statute.

In *Flemming* v. *Nestor,* supra, the Court found that the old-age benefits of an alien, deported for cause under the Immigration and Nationality Act, could be lawfully terminated without offending the Due Process Clause of the Fifth Amendment. There the Court rationalized that the noncontractural interest of an employee covered by the Social Security Act cannot be analogized to that of the holder of an annuity, where the right to benefits is based on a contractual duty to pay premiums, and further, that to hold otherwise would render the law too inflexible to permit necessary adjustment to ever-changing conditions. Justices Black, Douglas and Brennan dissented, each filing a separate dissenting opinion and each strongly arguing that the alien had a property

right in his old-age benefits and to deprive him of them was a violation of due process.

We have been referred to several unreported decisions of district courts and one reported decision, *Bartley* v. *Finch,* 311 F.Supp. 876 (E.D. Ky. 1970), in support of the defendant's position that Section 224 may be constitutionally applied, and it would indeed be easy for us to follow that path. However, we are not convinced that the issue raised in this case deserves such cavalier treatment, especially in view of the more recent decision of the Supreme Court in *Goldberg* v. *Kelly,* 397 U.S. 254 (1970), which tends to elevate entitlement to welfare to the status of a property right and to surround it with all the safeguards required by due process. Such benefits, the Court states (p. 262), are a matter of "statutory entitlement for persons qualified to receive them," and as support for this conclusion the Court, in footnote 8 of the same page, refers to an article in the Yale Law Review stating that,

> "It may be realistic today to regard welfare entitlements as more like 'property' than a 'gratuity.' "

Therefore, since the Court in *Goldberg* appears to have determined that entitlement to welfare is in the nature of a property right, protected by the Due Process Clause of the Fifth Amendment, by the same rationale it must be determined that one who has made direct contribution to the social security fund and becomes entitled to disability benefits thereunder should and ought to be accorded equal status and protection. For it seems to us to be patently unfair for the welfare recipient, under *Goldberg,* to have a "property right status" with all the procedural safeguards of due process, while the social security recipient, under *Nestor,* is deprived of such

status and protection. The distinction is not only completely illogical, but is grossly inequitable. Indeed, it appears to run counter to the intent of Congress as reflected by the comments by Senator George, Chairman of the Senate Finance Committee, at the time of the passage of the Social Security Act concerning its purpose and character, as quoted in the *Nestor* dissent, p. 623:

> " 'It comports better than any substitute we have discovered with the American concept that free men want to *earn* their security and not ask for doles—that what is due as a matter of *earned right* is far better than a gratuity. . . . (Emphasis added)
>
> " '*Social Security is not a handout; it is not charity; it is not relief.* It is an *earned right* based upon the contributions and earnings of the individual. As an *earned right*, the individual is eligible to receive his benefit in dignity and self-respect.' " (Emphasis added) 102 Cong. Rec. 15110.

Thus, we must conclude that the concept espoused by the majority in *Nestor*, that one who has contributed to the social security fund and later becomes eligible to receive the benefits provided by the Social Security Act has no indefeasible property right to such benefits, is no longer to be considered a viable and controlling precedent for that principle, in view of the more recent holding in *Goldberg* that a welfare recipient who has made no direct contribution to the fund from which he draws benefits does have a recognizable property right to such benefits and one which is protected by all the safeguards of due process.

## III

The other issue raised by the plaintiff is that the offset provision of Section 224 creates arbitrary dis-

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crimination between two classes of disabled workers, essentially indistinguishable from each other except that one is composed of those disabled persons who also receive workmen's compensation benefits and the other is composed of those disabled persons who also receive benefits from private disability insurance plans or tort claim awards, and that on the basis of this difference alone the first class has benefits reduced while the second class has benefits left untouched. In other words, the plaintiff complains that it is patently arbitrary to single out for the purpose of applying the offset *only* those who are receiving workmen's compensation and exclude those who are receiving benefits from other sources. The plaintiff further argues that the offset provision also discriminates between those who were disabled prior to June 1, 1965 and those who become disabled after June 1, 1965.

The defendant, in justification of these discriminatory features of the offset provision, argues that its purpose was to avoid duplication of *public* benefits. If this be its true purpose, it is certainly a laudable one and one with which this Court could wholeheartedly accept. However, the argument is inapplicable here for, as previously shown, workmen's compensation in West Virginia is not a gift from the public largesse, but rather is an entitlement arising from a contractual relationship between employer and employee, sanctioned by law, whereby each gave up a legal right in return for a concomitant legal benefit. That no public funds are involved is made abundantly clear by the provisions of West Virginia Code, 23–3–1. There, it is provided that the Workmen's Compensation Fund shall be supported by "premiums and other funds paid thereto by employers," from which shall be paid all benefits due the employees or their dependents and the expenses of administering the law. No public funds

being thus involved, the defendant's argument that plaintiff's workmen's compensation award should be treated as a public benefit obviously becomes quite untenable and must be rejected.

In sum, therefore, it is held that in the circumstances of plaintiff's case, the application of Section 224 cannot be constitutionally applied, since to do so would deprive him of due process and equal protection of the law under the Fifth and Fourteenth Amendments. The motion of the plaintiff for summary judgment will accordingly be granted and the motion of the defendant for summary judgment will be denied.

An appropriate order may be presented making this opinion a part of the record.

SIDNEY L. CHRISTIE,
*United States District Judge.*

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United States District Court for the Southern District of West Virginia at Bluefield

Civil Action No. 1185

RAYMOND BELCHER, PLAINTIFF

*v.*

ELLIOT L. RICHARDSON, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, DEFENDANT

JUDGMENT ORDER

This cause having been submitted on brief, the transcript of record certified to this Court in the manner prescribed by law, and upon plaintiff's and defendant's motion for summary judgment; and the Court having made its findings of fact and conclusions of law, as appears from its memorandum opinion dated September 10, 1970, in which this Court expressed

the opinion that defendant's motion for summary judgment should be denied, and that an order should be entered denying the defendant the right to offset workmen's compensation payments from the Social Security benefits made to plaintiff, it is, therefore

ADJUDGED and ORDERED that the memorandum opinion of the Court, dated September 10, 1970, be, and the same is hereby filed and made a part of the record in this action, and that the decision of the Secretary of Health, Education, and Welfare, applying the offset provisions of Section 224 of the Social Security Act be, and the same is hereby reversed, and the proposed offset by the Secretary against the plaintiff be, and it is hereby denied.

And be it further ADJUDGED and ORDERED:

(1) That counsel for the defendant shall promptly file with the Court a report stating the amount of the initial past due benefits to be paid the plaintiff and/or any ancillary beneficiaries, pursuant to this judgment order. A copy of such report shall be furnished by the defendant to counsel for the plaintiff; and

(2) That counsel for the plaintiff shall, within fifteen (15) days of the entry of this judgment order, file with the Court a verified petition for the approval and allowance of a fee for representing the plaintiff in this Court, pursuant to the provisions of Section 206(b)(1) of the Social Security Act, as amended July 30, 1965, 42 U.S.C.A. 406(b)(1), exhibiting therewith the original or a duplicate-original of any written contract of employment between the attorney and the plaintiff, and in any event, showing (a) what services were rendered by the attorney in the case and specifically the amount of time he devoted to it in this Court; (b) what expenses, if any, were personally incurred by the attorney in the prosecu-

tion of the case in this Court and for which he has not been reimbursed by his client; and (c) what sums, if any, have been paid the attorney by the plaintiff or by anyone for the plaintiff for services rendered in this Court. The petition must also contain an affirmation by the attorney that he will neither demand, receive nor accept from the plaintiff or from anyone for the plaintiff, any fee or remuneration for services rendered in this case in this Court other than that approved and allowed by this Court pursuant to such petition.

And this case shall remain upon the docket until such statement of initial benefits shall have been received from the defendant and until the matters arising upon the petition for the approval and allowance of an attorney's fee to counsel for the plaintiff shall have been adjudicated.

Enter: September 14, 1970.

(s) SIDNEY L. CHRISTIE,
*United States District Judge.*

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United States District Court for the Southern District of West Virginia at Bluefield

Civil Action No. 1185

RAYMOND BELCHER

*v.*

ELLIOT L. RICHARDSON, SECRETARY OF HEALTH, EDUCATION, AND WELFARE

Notice of Appeal to the Supreme Court of the United States Pursuant to 28 U.S.C. 1252 and 2101

Notice is hereby given that Elliott L. Richardson, Secretary of Health, Education and Welfare, defend-

ant herein, acting by and through the United States Attorney for the Southern District of West Virginia, hereby appeals to the Supreme Court of the United States, pursuant to 28 U.S.C. 1252 and 2101, from the Judgment entered in this action on September 14, 1970.

W. WARREN UPTON,
*United States Attorney, Southern District of West Virginia, 4006 Federal Building, 500 Quarrier Street, Charleston, W. Va. 25301.*

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United States District Court for the Southern District of West Virginia at Bluefield

Civil Action No. 1185

RAYMOND BELCHER

*v.*

ELLIOT L. RICHARDSON, SECRETARY OF HEALTH, EDUCATION, AND WELFARE

AFFIDAVIT OF SERVICE

STATE OF WEST VIRGINIA,
*County of Kanawha*:

W. Warren Upton, being first duly sworn on his oath deposes and says that he is a resident of the City of Charleston, County of Kanawha, State of West Virginia.

That he is the United States Attorney for the Southern District of West Virginia, at Bluefield, West Virginia, and

That on the 13th day of October, 1970 he mailed, postage prepaid, a copy of Notice of Appeal To The Supreme Court Of The United States, filed in the

above-captioned case, to counsel for plaintiff-appellee, as follows:

Mr. Marshall G. West
Attorney At Law
P. O. Drawer 469
Pineville, West Virginia 24874

W. WARREN UPTON,
*United States Attorney, Southern District of West Virginia, 4006 Federal Building, 500 Quarrier Street, Charleston, W. Va. 25301.*

SUBSCRIBED and SWORN to before me, this 13th day of October, 1970.

(S) BETTY JEAN MILLER,
*Notary Public in and for Kanawha County, West Virginia.*

My commission expires September 10, 1973.

## APPENDIX B

42 U.S.C. 424a provides:

§ 424a. REDUCTION OF DISABILITY BENEFITS THROUGH RECEIPT OF WORKMEN'S COMPENSATION.

(a) If for any month prior to the month in which an individual attains the age of 62—

(1) such individual is entitled to benefits under section 423 of this title, and

(2) such individual is entitled for such month, under a workmen's compensation law or plan of the United States or a State, to periodic benefits for a total or partial disability (whether or not permanent), and the Secretary has, in a prior month, received notice of such entitlement for such month,

the total of his benefits under section 423 of this title for such month and of any benefits under section 402 of this title for such month based on his wages and self-employment income shall be reduced (but not below zero) by the amount by which the sum of—

(3) such total of benefits under sections 423 and 402 of this title for such month, and

(4) such periodic benefits payable (and actually paid (for such month to such individual under the workmen's compensation law or plan, exceeds the higher of—

(5) 80 percentum of his "average current earnings", or

(6) the total of such individual's disability insurance benefits under section 423 of this title for such month and of any monthly insurance benefits under section 402 of this title for such month based on his wages and

self-employment income, prior to reduction under this section.

In no case shall the reduction in the total of such benefits under sections 423 and 402 of this title for a month (in a continuous period of months) reduce such total below the sum of—

(7) the total of the benefits under sections 423 and 402 of this title, after reduction under this section, with respect to all persons entitled to benefits on the basis of such individual's wages and self-employment income for such month which were determined for such individual and such persons for the first month for which reduction under this section was made (or which would have been so determined if all of them had been so entitled in such first month), and

(8) any increase in such benefits with respect to such individual and such persons, before reduction under this section, which is made effective for months after the first month for which reduction under this section is made.

For purposes of clause (5), an individual's average current earnings means the larger of (A) the average monthly wage used for purposes of computing his benefits under section 423 of this title, or (B) one-sixtieth of the total of his wages and self-employment income (computed without regard to the limitations specified in sections 409(a) and 411(b)(1) of this title) for the five consecutive calendar years after 1950 for which such wages and self-employment income were highest. In any case where an individual's wages and self-employment income reported to the Secretary for a calendar year reach the limitations specified in sections 409(a) and 411(b)(1) of this title, the Secretary under regulations shall estimate the total of such wages and self-employment income for puropses of clause (B) of the preceding sentence on the basis of such information as may

be available to him indicating the extent (if any) by which such wages and self-employment income exceed such limitations.

(b) If any periodic benefit under a workmen's compensation law or plan is payable on other than a monthly basis (excluding a benefit payable as a lump sum except to the extent that it is a commutation of, or a substitute for, periodic payments), the reduction under this section shall be made at such time or times and in such amounts as the Secretary finds will approximate as nearly as practicable the reduction prescribed by subsection (a) of this section.

(c) Reduction of benefits under this section shall be made after any reduction under subsection (a) of section 403 of this title but before deductions under such section and under section 422(b) of this title.

(d) The reduction of benefits required by this section shall not be made if the workmen's compensation law or plan under which a periodic benefit is payable provides for the reduction thereof when anyone is entitled to benefits under this subchapter on the basis of the wages and self-employment income of an individual entitled to benefits under section 423 of this title.

(e) If it appears to the Secretary that an individual may be eligible for periodic benefits under a workmen's compensation law or plan which would give rise to reduction under this section, he may require, as a condition of certification for payment of any benefits under section 423 of this tile to any individual for any month and of any benefits under section 402 of this title for such month based on such individual's wages and self-employment income, that such individual certify (i) whether he has filed or intends to file any claim for such periodic benefits, and (ii) if he has so filed, whether there has been a decision on such claim. The Secretary may, in the absence of evidence to the contrary, rely upon such a certification by

such individual that he has not filed and does not intend to file such a claim or that he has so filed and no final decision thereon has been made, in certifying benefits for payment pursuant to section 405(i) of this title.

(f)(1) In the second calendar year after the year in which reduction under this section in the total of an individual's benefits under section 423 of this title and any benefits under section 402 of this title based on his wages and self-employment income was first required (in a continuous period of months), and in each third year thereafter, the Secretary shall redetermine the amount of such benefits which are still subject to reduction under this section; but such redetermination shall not result in any decrease in the total amount of benefits payable under this subchapter on the basis of such individual's wages and self-employment income. Such redetermined benefit shall be determined as of, and shall become effective with, the January following the year in which such redetermination was made.

(2) In making the redetermination required by paragraph (1) of this subsection, the individual's average current earnings (as defined in subsection (a) of this section) shall be deemed to be the product of his average current earnings as initially determined under subsection (a) of this section and the ratio of (i) the average of the taxable wages of all persons for whom taxable wages were reported to the Secretary for the first calendar quarter of the calendar year in which such redetermination is made, to (ii) the average of the taxable wages of such persons reported to the Secretary for the first calendar quarter of the taxable year in which the reduction was first computed (but not counting any reduction made in benefits for a previous period of disability). Any amount determined under the preceding sentence which

is not a multiple of $1 shall be reduced to the next lower multiple of $1.

(g) Whenever a reduction in the total of benefits for any month based on an individual's wages and self-employment income is made under this section, each benefit, except the disability insurance benefit, shall first be proportionately decreased, and any excess of such reduction over the sum of all such benefits other than the disability insurance benefit shall then be applied to such disability insurance benefit.

Part 404.408 of 20 C.F.R. provides:

§ 404.408 Reduction of Benefits Based on Disability on Account of Receipt of Workmen's Compensation.

(a) *When reduction required.* Under section 224 of the Act, a disability insurance benefit to which an individual is entitled under section 223 of the Act for a month after 1965 and before the individual attains age 62 (and any monthly benefit for the same month payable to others under section 202 of the Act on the basis of the same earnings record) is reduced (except as provided in paragraph (b) of this section) by an amount as determined under paragraph (c) of this section if:

(1) The individual entitled to the disability insurance benefit is also entitled under a workmen's compensation law or plan of the United States or a State to a periodic benefit for such month for a total or partial disability (whether or not permanent) and

(2) The Secretary has, in a month before such month, received notice of such entitlement for such month, and

(3) The period of disability involved began after June 1, 1965.

(b) *When reduction not made.* The reduction of a benefit otherwise required by paragraph (a) of this section is not made if the workmen's compensation law or plan under which the periodic benefit is payable provides for

the reduction of such periodic benefit when anyone is entitled to a benefit under title II of the Act on the basis of the earnings record of an individual entitled to a disability insurance benefit under section 223 of the Act.

(c) *Amount of reduction*—(1) *General.* The total of benefits payable for a month under sections 223 and 202 of the Act to which paragraph (a) of this section applies is reduced (but not below zero) by the amount by which the sum of such total of benefits and such periodic benefits payable (and actually paid) for such month to such individual under the workmen's compensation law or plan exceeds the higher of:

(i) Eighty percent of his "average current earnings," as defined in subparagraph (3) of this paragraph, or

(ii) The total of such individuals's disability insurance benefit for such month and all other benefits payable for such month based on such individual's earnings record, prior to reduction under this section.

(2) *Limitation on reduction.* In no case may the total of monthly benefits payable for a month to the disabled worker and to the persons entitled to benefits for such month on his earnings record be less than:

(i) The total of the benefits payable (after reduction under paragraph (a) of this section) to such beneficiaries for the first month for which reduction under this section is made, and

(ii) Any increase in such benefits which is made effective for months after the first month for which reduction under this section is made.

(3) *Average current earnings defined*—(i) *In general.* An indiivdual's "average current earnings" for purposes of this section means the larger of:

(*a*) The average monthly wage used for purposes of computing the individual's disability insurance benefit under section 223 of the Act, or

(*b*) One-sixtieth of the total of such individual's wages and earnings from self-employment without the limitations under sections 209(a) and 211(b)(1) of the Act for the 5 consecutive calendar years after 1950 for which such wages and earnings from self-employment were highest. The extent by which such individual's wages and earnings from self-employment exceed the limitations under sections 209(a) and 211(b)(1) of the Act for any calendar year after 1950 is computed in accordance with the provisions of subdivision (ii) of this subparagraph. Any amount so computed which is not a multiple of $1 is reduced to the next lower multiple of $1.

(ii) ***Method of determining calendar year earnings in excess of the limitations under sections 209(a) and 211(b)(1) of the Act***—(*a*) *In general.* For the purposes of subdivision (i)(*b*) of this subparagraph, the extent by which the wages or earnings from self-employment of an individual exceed the maximum amount of earnings creditable under sections 209(a) and 211(b)(1) of the Act in any calendar year after 1950 will ordinarily be estimated on the basis of the earnings information available in the records of the Administration. (See Subpart I of this part.) If an individual adduces satisfactory evidence of his actual earnings in any year, the extent, if any, by which his earnings exceed the limitations under sections 209(a) and 211(b)(1) of the Act shall be determined by the use of such evidence instead of by the use of estimates.

(b) *Estimated wage earnings*—(*1*) *One employer involved.* In any calendar year after 1950 in which wages are reported for an individual, the wages credited to his earnings record for each calendar quarter before the quarter in which the maximum amount creditable under section 209(a) of the Act is attained are deemed to be the individual's actual earnings for each such quarter. The amount of wages for the

calendar quarter in which the maximum amount of earnings was attained and for each succeeding calendar quarter of that year, if any, in which the individual worked is deemed to be equal to the largest amount credited to his earnings account in that calendar year for any calendar quarter through the quarter in which the maximum amount of earnings was attained.

*Example.* In the year 1966 in which $6,600 is the maximum creditable earnings amount under section 209(a) of the Act. W worked for the XYZ Company. His earnings record shows the following amounts of wages:

| | |
|---|---|
| 1st quarter | $2,400 |
| 2d quarter | 2,550 |
| 3d quarter | 1,650 |
| 4th quarter | 0 |
| Total | 6,600 |

The maximum creditable earnings amount was reached in the third quarter. The amount of wages for that quarter and for the succeeding fourth quarter is deemed to equal the highest quarterly amount credited, i.e., the amount of $2,550 credited to the second quarter. Thus W's total estimated wages for the year 1966 are determined as follows:

| | |
|---|---|
| 1st quarter | $2,400 |
| 2d quarter | 2,550 |
| 3d quarter | 2,550 |
| 4th quarter | 2,550 |
| Total | 10,050 |

(*2*) *Two or more employers involved.* In any calendar year after 1950 in which wages are reported for an individual by more than one employer, if the total wages reported by any employer equal or exceed the maximum amount of earnings creditable under section 209(a) of the Act, the total wages from such employer for the quarters in which the individual worked for that employer are estimated in accordance with the provisions of (*1*) of this subdivision (ii) (*b*).

*Example.* In the calendar year 1964 in which $4,800 is the maximum amount of earnings creditable under section 209(a) of the Act, A

worked for four employers. The following amounts are creditable to his earnings record:

| | Employer No. 1 | Employer No. 2 | Employer No. 3 | Employer No. 4 | Total |
|---|---|---|---|---|---|
| 1st quarter | $1,400 | $1,200 | $0 | $0 | |
| 2d quarter | 1,200 | 1,200 | 150 | 300 | |
| 3d quarter | 2,200 | 1,200 | 0 | 1,800 | |
| 4th quarter | 0 | 1,200 | 250 | 2,700 | |
| | $4,800 | $4,800 | $400 | $4,800 | $14,800 |

Wages from Employer No. 1 reached the maximum in the third quarter. For this quarter and the succeeding fourth quarter, A's wages from Employer No. 1 are deemed to equal $2,200 in each of these two quarters. Wages from Employer No. 2 reached the maximum in the fourth quarter, but since all of the quarterly amounts credited are equal, there are no additional deemed wages. Since the total wages reported by Employer No. 3 never reached the maximum, the actual amounts credited are deemed to be his total wages from such employer. Wages from Employer No. 4 reached the maximum in the fourth quarter. However, since this is the highest quarterly amount credited and there are no succeeding quarters, the total earnings from this employer are deemed to be the actual amounts credited. Thus, A's total wages for 1964 are estimated as follows:

| | Employer No. 1 | Employer No. 2 | Employer No. 3 | Employer No. 4 | Total |
|---|---|---|---|---|---|
| 1st quarter | $1,400 | $1,200 | $0 | $0 | |
| 2d quarter | 1,200 | 1,200 | 150 | 300 | |
| 3d quarter | 2,200 | 1,200 | 0 | 1,800 | |
| 4th quarter | 2,200 | 1,200 | 250 | 2,700 | |
| | $7,000 | $4,800 | $400 | $4,800 | $17,000 |

(c) *Estimated earnings from self-employment.* In any such calendar year in which self-employment income is credited to an individual's earnings record and such credit equals

the maximum amount of earnings creditable under section 211(b)(1) of the Act, the amount of earnings from self-employment for such individual's taxable year is deemed to equal his total net earnings from self-employment as shown in his tax returns on file in the records of the Administration.

*Example.* In the calendar year 1957 in which $4,200 is the maximum amount creditable as self-employment income under section 211(b)(1) of the Act, C has maximum self-employment income of $4,200 credited to his earnings record. C's self-employment tax return for 1957 shows net earnings from self-employment of $8,300. Thus, C's earnings from self-employment are deemed to equal $8,300 for 1957.

(*d*) *Wages and self-employment income involved.* In any such calendar year, in which both wages and self-employment income are credited to an individual's earnings record, the amount of such individual's total earnings for such calendar year is deemed to equal the total of his wages as determined under the provisions of (*b*) of this subdivision and the amount of his net earnings from self-employment as determined under the provisions of (*c*) of this subdivision.

*Example.* For the calendar year 1967 in which $6,600 is the maximum creditable earnings under sections 209(a) and 211(b)(1) of the Act, D who was both employed and self-employed has the following amounts credited to his earnings record:

| | Wages | Self-employment income |
|---|---|---|
| 1st quarter | $1,500 | |
| 2d quarter | 1,500 | |
| 3d quarter | 1,500 | |
| 4th quarter | 1,500 | |
| | $6,000 | $600 |

Since the amount of wages credited do not equal or exceed the maximum amount creditable under section 209(a) of the Act, D's total wages for the year are deemed to be $6,000. However, the amount of net earnings from self-employment shown on D's self-employment tax return is $2,300. D's earnings from self-employment are deemed to equal net earnings from self-employment which he reported for the year. Thus, D's earnings for 1967 are estimated as follows:

| | |
|---|---|
| Wages | $6,000 |
| Net earnings from self-employment | 2,300 |
| Total | 8,300 |

(4) *Reentitlement to disability insurance benefits.* If an individual's entitlement to disability insurance benefits terminates and such individual again becomes entitled to disability insurance benefits, the amount of the reduction is again computed based on the figures specified in this paragraph (c) applicable to the subsequent entitlement.

(d) *Items not counted for reduction.* Amounts included in the workmen's compensation award which are specifically identifiable as being for medical, legal or related expenses paid or incurred by the individual in connection with his workmen's compensation claim, or the injury or occupational disease on which it is based, are excluded in computing the reduction under paragraph (a) of this section.

(e) *Certification by individual concerning eligibility for workmen's compensation payment.* Where it appears that an individual may be eligible for a periodic benefit under a workmen's compensation law or plan which would give rise to reduction under paragraph (a) of this section, the individual may be required, as a condition of certification for payment of any benefit under section 223 of the Act to any individual for any month, and of any benefit

under section 202 of the Act for such month based on such individual's earnings record, to furnish evidence as requested by the Administration and to certify as to:

(1) Whether he has filed or intends to file any claim for such periodic benefit, and

(2) If he has so filed, whether there has been a decision on such claim. In the absence of evidence to the contrary, reliance may be placed upon a certification that he has not filed and does not intend to file such a claim, or that he has filed and no decision has been made, in certifying any benefit for payment pursuant to section 205(i) of the Act.

(f) *Workmen's compensation benefit payable on other than a monthly basis.* Where workmen's compensation benefits are paid periodically but not monthly, or in a lump sum as a commutation of or a substitute for periodic benefits, the reduction under this section is made at such time or times and in such amounts as the Administration determines will approximate as nearly as practicable the reduction required under paragraph (a) of this section.

(g) *Priorities.* (1) For an explanation of when a reduction is made under this section where other reductions, deductions, etc., are involved, see § 404.402.

(2) Whenever a reduction in the total of benefits for any month based on an individual's earnings record is made under paragraph (a) of this section, each benefit, except the disability insurance benefit, is first proportionately decreased, and any excess of such reduction over the sum of all such benefits other than the disability insurance benefit is then applied to such disability insurance benefit.

*Example:* Under title II of the Act, A is entitled to a monthly disability insurance benefit of $122. His wife, B, and his two children, C and D, are entitled to monthly insurance benefits

of $61 each. After adjustment for the family maximum under section 203(a) of the Act, the benefits are $122 for A and $50.60 for B, C, and D making a total of title II benefits of $273.80. In computing A's "average current earnings," it is determined that A's average monthly wage used in computing his benefit rate is $340, and his average monthly wage for his 5 years of highest earnings after 1950 is $400. Therefore, 80 percent of his "average current earnings" for purposes of the workmen's compensation deduction is $320.

A becomes entitled to workmen's compensation of $48 a week, which converted to a monthly rate amount to $208 a month (i.e., 4⅓ times $48). The total monthly benefits payable under title II of the Act ($273.80) plus the monthly workmen's compensation amount ($208) equals $481.80. The amount of the reduction for workmen's compensation is $161.80 ($481.80 minus $320); and the family benefit payable is $112 ($273.80 minus $161.80 equals $112). (The same result is obtained by subtracting the workmen's compensation amount ($208) from the applicable limit ($320).)

In this example, the $161.80 reduction would be applied first against the three section 202 benefits ($50.60 times 3 equals $151.80) leaving $10 to be deducted from the disability insurance benefit.

(h) *Effect of changes in family composition.* The addition or subtraction in the number of beneficiaries in a family may cause the family benefit to become, or cease to be, the applicable limit for reduction purposes under this section. When the family composition changes, the amount of the reduction is recomputed as though the new number of beneficiaries were entitled for the first month the reduction was imposed, i.e., the same average monthly wage, average current earnings, and workmen's compensation amount and the total benefits pay-

able under title II of the Act for the new number of beneficiaries which would have been subjected to reduction for that first month are used. If the applicable limit both before and after the change is 80 percent of the average earnings, the amount payable remains the same and is simply redistributed among the beneficiaries entitled on the same earnings record.

*Example:* F is entitled to disability insurance benefits of $110.80 based on an average monthly wage of $289. His wife, G, and his child, H, are entitled to benefits under section 202 of the Act of $55.20 each. F becomes entitled to workmen's compensation of $192 a month. His average monthly wage for his 5 years of highest earnings after 1950 is $260.

The applicable limit on total benefits payable under title II of the Act and workmen's compensation is $231.20 (i.e., 80 percent of F's average current earnings). The amount payable is figured as follows:

| | | |
|---|---|---|
| Total title II benefits | $220.70 | $220.70 |
| Monthly workmen's compensation | 192.00 | |
| | 412.70 | |
| Less 80 percent of F's average current earnings | 231.20 | |
| Reduction amount | 181.50 | 181.50 |
| Amount payable | | 39.20 |

(Deducting the workmen's compensation amount ($192) from 80 percent of the average current earnings ($231.20) gives the same amount payable ($39.20).)

Later, another child, J, becomes entitled on F's earnings record and the benefits after adjustment for the family maximum but before reduction for the workmen's compensation become $110.30 to F, and $40.90 to G, H, and J each. Since the total family benefit is now higher than 80 percent of F's average current earnings, the total family benefit becomes the

applicable limit and the amount payable is figured merely by deducting the workmen's compensation ($192) from the total title II benefits ($233) leaving $41 payable to F.

(i) *Effect on benefit increases.* Any increase in benefits due to a recomputation or a statutory increase in benefit rates is not subject to the reduction for workmen's compensation and does not change the amount to be deducted from the family benefits. The increase is simply added to what amount if any is payable. If a new beneficiary becomes entitled to monthly benefits on the same earnings record after the increase, the amount of the reduction is redistributed among the new number of beneficiaries entitled under section 202 of the Act and deducted from their current benefit rate.

*Example:* K is entitled to disability insurance benefits of $118.80 and his wife, L, and his two children, M and N, are entitled to benefits under section 202 of the Act of $47.90 each (after reduction under section 203(a) to conform to the family maximum of $262.40). K becomes entitled to workmen's compensation of $30 per week ($130 per month). The total family benefit is higher by 10 cents than 80 percent of K's average current earnings (80 percent of $328, or $262.40). Therefore, the reduction amount equals the monthly workmen's compensation. One-third of this amount (rounded downward to the nearest 10 cents), i.e., $43.30, is deducted from L, M, and N's benefits leaving benefits payable as follows: $118.80 to K, and $4.60 each to L, M, and N.

Beginning in September 1966, a statutory increase raises K's disability insurance benefit to $122 and causes L, M, and N's benefits to be increased to $50.60 each (an increase of $2.70). The benefits then payable become: $122 to K, and $7.30 (i.e., $4.60 plus $2.70) each to L, M, and N.

In February 1967, O, another child of K, becomes entitled to benefits under section 202 of the Act based on K's earnings record. The benefits payable now become $122 to K, and $37.90 each to L, M, N, and O. The amount to be deducted from the family remains the same, $130, but is to be divided among four beneficiaries instead of three. Deducting one-fourth of $130 ($32.50) from $37.90 leaves $5.40 each to L, M, N, and O, and $122 to K.

(j) *Redetermination of benefits*—(1) *General.* In the second calendar year after the year in which reduction under this section in the total of an individual's benefits under section 223 of the Act and any benefits under section 202 of the Act based on his wages and self-employment income is first required (in a continuous period of months), and in each third year thereafter, the amount of such benefits which are still subject to reduction under this section are redetermined, provided such redetermination does not result in any decrease in the total amount of benefits payable under title II of the Act on the basis of such individual's wages and self-employment income. Such redetermined benefit is effective with the January following the year in which the redetermination is made.

(2) *Average current earnings.* In making the redetermination required by subparagraph (1) of this paragraph, the individual's "average current earnings" (as defined in paragraph (c)(3) of this section) is deemed to be the product of his average current earnings as initially determined under paragraph (c)(3) of this section and the ratio of:

(i) The average of the taxable wages of all persons for whom taxable wages were reported to the Secretary for the first calendar quarter of the calendar year in which such redetermination is made, to

(ii) The average of the taxable wages of such persons reported to the Secretary for the first calendar quarter of the taxable year in which the reduction was first computed (but not counting any reduction made in benefits for a previous period of disability). Any amount determined under the preceding sentence which is not a multiple of $1 is reduced to the next lower multiple of $1.

(3) *Effect of redetermination.* Where the applicable limit on total benefits previously used was 80 percent of the average current earnings, a redetermination under this paragraph may cause an increase in the amount of benefits payable. Also, where the limit previously used was the total family benefit, the redetermination may cause the average current earnings to exceed the total family benefit and thus become the new applicable limit. If for some other reason (such as a statutory increase or recomputation) the benefit has already been increased to a level which equals or exceeds the benefit resulting from a redetermination under this paragraph, no additional increase is made. A redetermination is designed to bring benefits into line with current wage levels when no other change in payments has done so.

*Example:* Beginning January 1968, P is entitled to a disability insurance benefit of $140 and his wife, R, and child, S, are entitled to benefits under section 202 of the Act of $70 each. P becomes entitled to workmen's compensation of $208 per month. In this case, the applicable limit on the combined benefits is $360 (80 percent of P's average current earnings). Deducting the workmen's compensation amount of $208 from this limit leaves family benefits payable of $152 ($140 to P and $6 to R and S each). In 1970 a redetermination raises 80 percent of P's average current earnings to $380 effective January 1971. Thus, the family benefit payable becomes $172 ($380 minus $208). P's

benefit is $140, and R's and S's benefits are $16 each.

If there had been a benefit increase in 1969 (either by a statutory increase or a recomputation) increasing P's benefit by $10 (to $150) and each other benefit by $5 (to $11) the family would already be receiving $172 ($150 plus $11 plus $11 equals $172) at the time of redetermination, so that they would not get an additional increase. If the 1969 benefit increase made less than $172 payable to the family, the redetermination would increase the benefit to $172. Any statutory increase that takes effect after the redetermination would be added to the total family benefit.

U. S. GOVERNMENT PRINTING OFFICE: 1970

No. ~~1091~~

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1970

70-53

ELLIOT L. RICHARDSON, SECRETARY OF HEALTH, EDUCATION AND WELFARE,
*Appellant*

*v.*

RAYMOND BELCHER

---

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

---

## MOTION TO AFFIRM

---

**MARSHALL G. WEST**
Attorney at Law
Pineville, West Virginia

Mullens Advocate Print — Mullens, W. Va.

IN THE

# Supreme Court of the United States

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

---

## MOTION TO AFFIRM

---

Pursuant to Rule 16 (i) (e) of the rules of this Court, the appellee, Raymond Belcher, moves to affirm the judgment of the District Court for the Southern District of West Virginia, at Bluefield, West Virginia, The Honorable Judge Sidney L. Christie.

## STATEMENT

Appellee was awarded a period of disability and entitlement to disability insurance benefits pursuant to the provisions of Section 216 (i) and 223 of the Social Security Act, United States Code, Title 42, Section 416 (i) (Tr. 57-58) based on his application of May 20, 1968. The appellee, pursuant to the decision of the ap-

pellant, became entitled to benefits commencing October, 1968, in the amount of $156.00 per month. His wife and three (3) children became entitled to benefits on the appellee's earnings record in the amount of $57.90 each effective October, 1968, for a total family benefit of $329.70 per month. The appellee became entitled to total temporary disability benefits under the West Virginia Workmen's Compensation Act at the rate of $47.00 per week, or $203.60 per month commencing March 25, 1968, (Tr. 29-30) based upon the decision of the Commissioner of the West Virginia Workmen's Compensation Fund dated May 6, 1968, under Claim Number 68-35807 (Tr. 61).

The appellant thereafter reduced the benefits of the appellee's wife and three children from $57.90 per month, each, to $23.10 per month, each, thus reducing the total family benefit from $329.70 to $225.30, for a total reduction of monthly benefits of $104.40 per month based upon the receipt of temporary total disability benefits from the West Virginia Workmen's Compensation Fund (Tr. 61) (Tr. 65) by the appellee. The appellant rendered his decision based on the application of Section 224 of the Social Security Act, 42 U.S.C. (Supp. 5, 1965-69), 424 (a)[1], advising the appellee the manner in

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1

Section 224 of the Social Security Act, 42 U.S.C.A. Section 424, as amended, July 30, 1965 and January 2, 1968, provides:

"(a) If for any month prior to the month in which an individual attains the age of 62 ——

"(1) such individual is entitled to benefits under section 223, and

"(2) such individual is entitled for such month, under a workmen's compensation law or plan of the United States or a State, to periodic benefits for a total or partial disability (whether or not permanent), and the Secretary has, in a prior month, received notice of such entitlement for such month, the total of his benefits under section 223 for such month and of any benefits under section 202 for such month based on his wages and self-employment income will be reduced (but not below zero) by the amount by which the sum of ——

"(3) such total of benefits under sections 223 and 202 for such month, and

which Section 224 of the Social Security Act was being applied (Tr. 57-58). The appellee thereafter objected to this decision, and a hearing was held on October 9, 1969 (Tr. 7), and a decision rendered by the appellant based on such hearing dated October 31, 1969, (Tr. 7-12) denying the appellee's relief and affirming the prior decision of the appellant. The appellee thereafter requested review of this denial ((Tr. 5) and the appellant concluded again that its action was correct under the law, and affirmed its prior determinations (Tr. 3). The appellee, dissatisfied with this decision of the appellant, commenced civil action in the United States District Court for the Southern District of West Virginia, at Bluefield, West Virginia, purusant to authority of the statutes of the United States, as set forth in United States Code, Title 42, Section 405 (g), being Section 205 (g) of the Social Security Act, as amended, to obtain a judicial review of the appellant's decision reducing the appellee's wife's and children's benefits under the appli-

**Footnote 1 continued:**

"(4) such periodic benefits payable (and actually paid) for such month to such individual under the workmen's compensation law or plan, exceeds the higher of ——

"(5) 80 per centum of his 'average earnings', or

"(6) the total of such individual's disability insurance benefits under section 223 for such month and of any monthly insurance benefits under section 202 for such month based on his wages and self-employment income, prior to reduction under this section. In no case shall the reduction in the total of such benefits under sections 223 and 202 for a month (in a continuous period of months) reduce such total below the sum of ———

"(7) the total of the benefits under section 223 and 202, after reduction under this section, with respect to all persons entitled to benefits on the basis of such individual's wages and self-employment income for such month which were determined for such individual and such persons for the first month for which reduction under this section was made (or which would have been so determined if all of them had been so entitled in such first month), and

"(8) any increase in such benefits with respect to such individual and such persons, before the reduction under this section, which is made effective for months after the first month for which reduction under this section is made."

cation of Section 224 of the Social Security Act by reason of receipt of the appellee of temporary total disability benefits under the West Virginia Workmen's Compensation Act due to an industrial injury of March 25th, 1968, contending that the appellant, in applying the provisions of Section 224 of the Social Security Act, violated his constitutional rights in that it deprived the appellee of his property right without due process of law and that the Act is discriminatory and thus unconstitutional in that it treats persons in the same class differently, specifically stating that the Act did not apply to recipients of disability insurance benefits whose period of disability was established prior to June 1, 1965, and singles out persons who are only recipients of Workmen's Compensation benefits based upon industrial accidents and not applying to any recipients who may have income from other sources than a State Workmen's Compensation Fund. The Honorable Judge Sidney L. Christie, in an opinion dated September 10, 1970, as set forth in (Appendix A, infra, pp. 8 to 16), held that the appellant could not constitutionally apply Section 224 of the Social Security Act to the appellee under the circumstances of his case, since to do so would deprive him of due process of law and of equal protection of the law under the Fifth and Fourteenth Amendments. The appellant thereafter, pursuant to order entered by the District Court, (Appendix A, infra, pp. 17 and 18), made application for a direct appeal to this Court under the provisions of 28 U.S.C. 1252.

## ARGUMENT

The appellant contends that Section 224 of the Social Security Act is not violative of the due process clause of the Fifth Amendment and equal protection under the same amendment to the Constitution of the United States of America stating that the reliance of the Court below on the characterization of West Virginia Workmen's Compensation benefits as private in nature is mis-guided, is erroneous and certainly not supported

by the West Virginia Code, Chapter 23, Article 2, Sections 1, 6, 6a, 7, 8 and 9, Code of West Virginia, 1931, as amended, as set forth in Appendix B, infra, pp. 19 to 29. With the exception of certain state agencies, the West Virginia Workmen's Compensation Act makes it voluntary whether an employer elects to be a member of the Fund or elects to be a self-insurer after certain compliances or whether he elects not to be a member thereof. If an employer does not become a member of the Fund, nor elects to be a self-insurer under the Fund, he may nevertheless provide his own payment to injured employees during the course of and resulting in their employment, in which case Section 224 of the Social Security Act would not be applicable. The disadvantage of not being a member of the Fund is that the common law defenses of contributory negligence, the assumption of risk and fellow servant rule are not available to employers in the event of a tort action by the employee. The statement of the appellant that employers who elect not to participate in the Fund must provide their own method of compensation is an incorrect statement of the law. The District Court in its opinion citing *Goldberg* vs. *Kelly,* 397 U. S. 254 as authority for the proposition that once the statutory requirements are met, the status of a property right thus appears to be vested and must, therefore, be closeted with the safeguards of due process. It appears that what the Court is saying in *Goldberg* vs. *Kelly*, et seq, is that when the statutory requirements are met by an applicant for welfare benefits, a status is created which is protected by due process. Using this rationale it would be equally true that once an applicant for Social Security benefits has met all of the required disability requirements, that applicant then has such right under the reasoning of the *Goldberg* vs. *Kelly* case, et seq, which is protected under the due process clause. The fact that the applicant for such status under the Social Security Act contributes his own money to such Fund gives added weight that he has a vested property right once he meets the requirements to receive funds therefrom, that must be protected with due process. To

permit Congress to set up requirements for an applicant to receive benefits under the Act, and have him to qualify for such benefits, only to have them reduced or taken completely away from him by reason of a contractual status with his employer and have it apply only to him is discrimination in its worst form and does not provide equal protection under the Fifth Amendment.

The Fifth Amendment to the Constitution of the United States of America provides in pertinent parts, that:

> "No person shall . . . be deprived of life, liberty, or property without due process of law; . . .".

Although the Fifth Amendment to the Constitution of the United States of America provides a restraining and protecting effect on Federal Governmental action, it does not specifically contain an equal protection clause; it does, however, forbid discrimination that is so unjustifiable as to be violative of due process. *Bolling* vs. *Sharpe,* 347 U.S. 497, 74 St. Ct. 693.

The provisions of 42 U.S.C.A. 424 (a), being Section 224 of the Social Security Act is contrary to the purpose of the Social Security Act, and bears no rational relation to the purpose of the Social Security Act. A statute which operates to the detriment of persons who are to be benefited by the statutes and thus, subverts the very objective that it is intended to serve, violates due process, and this appears to be abundantly clear from the close reading of the dissent in the *Fleming* vs. *Nestor* case, 363 U.S. 603, at p. 623, when Senator George, Chairman of the Senate Finance Committee, at the time of the passage of the Social Security Act concerning its purpose and character comments:

> " 'It comports better than any substitute we have discovered with the American concept that free men want to earn their security and not ask for doles — that what is due as a matter

of earned right is far better than a gratuity . . . .

> " 'Social Security is not a handout; it is not charity; it is not relief. It is an earned right based upon the contributions and earnings of the individual. As an earned right, the individual is eligible to receive his benefit in dignity and self-respect.' "

Thus with this strong dissent in the *Nestor* case, et seq, the reasoning espoused in the *Goldberg* vs. *Kelly* case, et seq, takes on real significance when we try to apply the arbitrary and discriminatory provisions of Section 224 of the Social Security Act to two classes of disabled workers essentially indistinguishable from each other except that one is composed of those disabled persons who receive Workmen's Compensation benefits and the other is composed of those disabled persons who also receive benefits from other sources such as private disability insurance plans or tort claim awards or sick pay benefits.

## CONCLUSION

In conclusion, it is clear that the appellee has met the disability requirements of the Social Security Act and thus a property right status created that must thereafter be protected from the arbitrary and discriminatory limitations placed on such right by acts of Congress as is contained in 42 U. S. C. A. 424 (a) which defeats or seriously impairs the very purpose of the Social Security Act. To argue that Section 224 of the Social Security Act is to prevent duplication of public funds in the instance case is without foundation, as was so clearly pointed out in the learned District Judge's opinion of September 10, 1970. It is, therefore, respectfully submitted that the decision of the District Court should and must be affirmed.

Respectfully submitted.

**MARSHALL G. WEST**
Attorney at Law
Pineville, West Virginia
*Attorney for Appellee*

## APPENDIX A

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

AT BLUEFIELD

---

RAYMOND BELCHER,

*Plaintiff*

VS. CIVIL ACTION NO. 1185

ELLIOT L. RICHARDSON, Secretary of Health, Education and Welfare,

*Defendant*

---

September 10, 1970

ATTORNEY FOR PLAINTIFF:

Marshall G. West
West, Blackshear and Rundle
Attorneys at Law
Pineville, West Virginia

ATTORNEYS FOR DEFENDANT:

Honorable W. Warren Upton
United States Attorney
Charleston, West Virginia

Honorable Leo J. Meisel
Assistant U. S. Attorney
Huntington, West Virginia

CHRISTIE, DISTRICT JUDGE:

This is an action under Section 205(g) of the Social Security Act, 42 U.S.C.A. 405(g), to review a final decision of the Secretary of Health, Education and Welfare. A decision by a hearing examiner on October 31, 1969, became the final decision of the Secretary on January 20, 1970, when it was affirmed by the Appeals Council. The matter is before the Court on the cross motions of the parties for summary judgment pursuant to Rule 56.

The plaintiff filed an application for disability insurance benefits on May 20, 1968, alleging that he became unable to work on March 25, 1968, as the result of an injury. On May 20, 1968, his wife and children also applied for benefits under the Act. The Secretary having determined that plaintiff was disabled within the meaning of the Act, all applicants were awarded benefits on September 30, 1968, such benefits to begin with the month of October 1968.

Later, plaintiff received an award of $203.60 per month from the Workmen's Compensation Fund of West Virginia as the result of a work-related injury. Upon learning of this award, the Social Security Administration applied the "offset" provisions of Section 224 of the Social Security Act, 42 U.S.C.A. 424(a).[1]

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1

Section 224 of the Social Security Act, 42 U.S.C.A. Section 424, as amended, July 30, 1965 and January 2, 1968, provides:

"(a) If for any month prior to the month in which an individual attains the age of 62—

"(1) such individual is entitled to benefits under section 223, and

"(2) such individual is entitled for such month, under a workmen's compensation law or plan of the United States or a State, to periodic benefits for a total or partial disability (whether or not permanent), and the Secretary has, in a prior month, received notice of such entitlement for such month,

On February 10, 1969, plaintiff's attorney requested a reconsideration of the offset reductions which the Administration rejected on July 19, 1969. Thereupon, said attorney requested a hearing, held October 9, 1969, at which he presented argument supporting his claim that Section 224 deprived plaintiff and his family of a prop-

**Footnote 1 continued:**

the total of his benefits under section 223 for such month and of any benefits under section 202 for such month based on his wages and self-employment income will be reduced (but not below zero) by the amount by which the sum of—

"(3) such total of benefits under sections 223 and 202 for such month, and

"(4) such periodic benefits payable (and actually paid) for such month to such individual under the workmen's compensation law or plan,

exceeds the higher of —

"(5) 80 per centum of his 'average earnings', or

"(6) the total of such individual's disability insurance benefits under section 223 for such month and of any monthly insurance benefits under section 202 for such month based on his wages and self-employment income, prior to reduction under this section.

In no case shall the reduction in the total of such benefits under sections 223 and 202 for a month (in a continuous period of months) reduce such total below the sum of —

"(7) the total of the benefits under sections 223 and 202, after reduction under this section, with respect to all persons entitled to benefits on the basis of such individual's wages and self-employment income for such month which were determined for such individual and such persons for the first month for which reduction under this section was made (or which would have been so determined if all of them had been so entitled in such first month), and

"(8) any increase in such benefits with respect to such individual and such persons, before reduction under this section, which is made effective for months after the first month for which reduction under this section is made."

erty right without due process of law and that it was discriminatory inasmuch as it discriminated unfairly between persons of a similar class. On October 31, 1969, the hearing examiner issued his opinion upholding the legality of the reduction of benefits. This decision became the final decision of the Secretary on January 20, 1970, when it was affirmed by the Appeals Council. Thereupon, plaintiff timely filed the instant action in this court.

I

As previously noted (footnote 1), Section 224 provides for a reduction in social security disability benefits for such time as the claimant receives workmen's compensation benefits for either total or partial disability. Workmen's compensation laws generally provide compensation to employees for loss resulting from industrial aceidents and disease growing out of or resulting from their employment. The need for such a system arose out of conditions produced by modern industrial development and was premised upon the idea that the common-law rule of liability for personal injuries incident to the operation of industrial enterprises, which was based upon the negligence of the employer, with its defenses of contributory negligence, fellow servant's negligence, and assumption of risk, was outmoded by modern conditions.

West Virginia's Workmen's Compensation Law is found in Chapter 23 of the West Virginia Code. The law creates a "Workmen's Compensation Fund" which is sustained by contributions made to it by the employers who voluntarily elect to come under the provisions of the law, such contributions being based upon a percentage of the gross wages of their employees. The employees make no direct monetary contributions to the fund and the system is state-operated. Basically, the law takes from the employee his common-law right to sue his employer for damages for negligence in return for payment from the fund of limited or scheduled benefits for disability or death resulting from or growing out of the

employment relationship, regardless of any fault of the employer.

In West Virginia the relation of employer and employee, under the law, is termed contractual in nature, the statute becoming an integral part of the contract of employment, and imposing upon the employer and employee, respectively, a limitation of rights and liabilities. *Gooding* v. *Ott,* 77 W. Va. 487, 87 S.E. 862; *Lancaster* v. *State Compensation Comr.,* 125 W. Va. 190, 23 S.E. 2d 601. Thus, in no sense of the word can one's workmen's compensation benefits be termed a gratuity; rather they must be treated as a contractual entitlement. So it is seen that the issue before this Court as to this aspect of the case is whether or not Section 224 of the Social Security Act, requiring reduction in plaintiff's social security benefits in proportion to the amount of his workmen's compensation benefits, may be constitutionally applied.

## II

It cannot be seriously contended that the Social Security Act itself is unconstitutional for its constitutionality has been upheld in a long line of cases. *Helvering* v. *Davis,* 301 U.S. 619 (1937). See also *Steward Machine Company* v. *Davis,* 301 U.S. 584 (1937), and *Carmichael* v. *Southern Coal and Coke Company,* 301 U.S. 495 (1937). It is equally well settled that entitlement to social security benefits is subject to all conditions set out in the Social Security Act under which benefits are to be paid. *Flemming* v. *Nestor,* 363 U.S. 603 (1960); *Gruenwald* v. *Gardner,* 396 F. 2d 591 (2d Cir. 1968), cert. den. *Gruenwald* v. *Cohen,* 393 U.S. 982 (1968); *Price* v. *Flemming,* 168 F. Supp. 392 (D.Ct. N. J. 1968), affirmed 280 F. 2d 956 (3d Cir. 1960), cert. den. 365 U.S. 817 (1961).

Notwithstanding, as previously noted, plaintiff urges that the offset provision of Section 224 deprives him of his property (benefits) without due process of law. The answer would seem to hinge upon whether the plaintiff has such an indefeasible right or interest in his

social security benefits that the concept of due process precludes application of the offset statute.

In *Flemming* v. *Nestor,* supra, the Court found that the old-age benefits of an alien, deported for cause under the Immigration and Nationality Act, could be lawfully terminated without offending the Due Process Clause of the Fifth Amendment. There the Court rationalized that the noncontractural interest of an employee covered by the Social Security Act cannot be analogized to that of the holder of an annuity, where the right to benefits is based on a contractual duty to pay premiums, and further, that to hold otherwise would render the law too inflexible to permit necessary adjustment to ever-changing conditions. Justices Black, Douglas and Brennan dissented, each filing a separate dissenting opinion and each strongly arguing that the alien had a property right in his old-age benefits and to deprive him of them was a violation of due process.

We have been referred to several unreported decisions of district courts and one reported decision, *Bartley* v. *Finch,* 311 F. Supp. 876 (E.D. Ky. 1970), in support of the defendant's position that Section 224 may be constitutionally applied, and it would indeed be easy for us to follow that path. However, we are not convinced that the issue raised in this case deserves such cavalier treatment, especially in view of the more recent decision of the Supreme Court in *Goldberg* v. *Kelly,* 397 U.S. 254 (1970), which tends to elevate entitlement to welfare to the status of a property right and to surround it with all the safeguards required by due process. Such benefits, the Court states (p. 262), are a matter of "statutory entitlement for persons qualified to receive them," and as support for this conclusion the Court, in footnote 8 of the same page, refers to an article in the Yale Law Review stating that,

> "It may be realistic today to regard welfare entitlements as more like 'property' than a 'gratuity.' "

Therefore, since the Court in *Goldberg* appears to have

determined that entitlement to welfare is in the nature of a property right, protected by the Due Process Clause of the Fifth Amendment, by the same rationale it must be determined that one who has made direct contribution to the social security fund and becomes entitled to disability benefits thereunder should and ought to be accorded equal status and protection. For it seems to us to be patently unfair for the welfare recipient, under *Goldberg,* to have a "property right status" with all the procedural safeguards of due process, while the social security recipient, under *Nestor,* is deprived of such status and protection. The distinction is not only completely illogical, but is grossly inequitable. Indeed, it appears to run counter to the intent of Congress as reflected by the comments by Senator George, Chairman of the Senate Finance Committee, at the time of the passage of the Social Security Act concerning its purpose and character, as quoted in the *Nestor* dissent, p. 623:

> " 'It comports better than any substitute we have discovered with the American concept that free men want to *earn* their security and not ask for doles — that what is due as a matter of *earned right* is far better than a gratuity . . . . (emphasis added)
>
> " '*Social Security is not a handout; it is not charity; it is not relief.* It is an *earned right* based upon the contributions and earnings of the individual. As an *earned right,* the individual is eligible to receive his benefit in dignity and self-respect.' " (Emphasis added)
> 102 Cong. Rec. 15110.

Thus, we must conclude that the concept espoused by the majority in *Nestor,* that one who has contributed to the social security fund and later becomes eligible to receive the benefits provided by the Social Security Act has no indefeasible property right to such benefits, is no longer to be considered a viable and controlling prece-

dent for that principle, in view of the more recent holding in *Goldberg* that a welfare recipient who has made no direct contribution to the fund from which he draws benefits does have a recognizable property right to such benefits and one which is protected by all the safeguards of due process.

## III

The other issue raised by the plaintiff is that the offset provision of Section 224 creates arbitrary discrimination between two classes of disabled workers, essentially indistinguishable from each other except that one is composed of those disabled persons who also receive workmen's compensation benefits and the other is composed of those disabled persons who also receive benefits from private disability insurance plans or tort claim awards, and that on the basis of this difference alone the first class has benefits reduced while the second class has benefits left untouched. In other words, the plaintiff complains that it is patently arbitrary to single out for the purpose of applying the offset *only* those who are receiving workmen's compensation and exclude those who are receiving benefits from other sources. The plaintiff further argues that the offset provision also discriminates between those who were disabled prior to June 1, 1965 and those who become disabled after June 1, 1965.

The defendant, in justification of these discriminatory features of the offset provision, argues that its purpose was to avoid duplication of *public* benefits. If this be its true purpose, it is certainly a laudable one and one with which this Court could wholeheartedly accept. However, the argument is inapplicable here for, as previously shown, workmen's compensation in West Virginia is not a gift from the public largesse, but rather is an entitlement arising from a contractual relationship between employer and employee, sanctioned by law, whereby each gave up a legal right in return for a concomitant legal benefit. That no public funds are involved is made abundantly clear by the provisions of West Virginia Code, 23-3-1. There, it is provided that the

Workmen's Compensation Fund shall be supported by "premiums and other funds paid thereto by employers," from which shall be paid all benefits due the employees or their dependents and the expenses of administering the law. No public funds being thus involved, the defendant's argument that plaintiff's workmen's compensation award should be treated as a public benefit obviously becomes quite untenable and must be rejected.

In sum, therefore, it is held that in the circumstances of plaintiff's case, the application of Section 224 cannot be constitutionally applied, since to do so would deprive him of due process and equal protection of the law under the Fifth and Fourteenth Amendments. The motion of the plaintiff for summary judgment will accordingly be granted and the motion of the defendant for summary judgment will be denied.

An appropriate order may be presented making this opinion a part of the record.

SIDNEY L. CHRISTIE

United States District Judge

## APPENDIX A

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

AT BLUEFIELD

RAYMOND BELCHER,
*Plaintiff,*

v. CIVIL ACTION NO. 1185

ELLIOT L. RICHARDSON, Secretary of Health, Education, and Welfare,
*Defendant.*

### JUDGMENT ORDER

This cause having been submitted on brief, the transcript of record certified to this Court in the manner prescribed by law, and upon paintiff's and defendant's motion for summary judgment; and the Court having made its findings of fact and conclusions of law, as appears from its memorandum opinion dated September 10, 1970, in which this Court expressed the opinion that defendant's motion for summary judgment should be denied, and that an order should be entered denying the defendant the right to offset workmen's compensation payments from the Social Security benefits made to plaintiff, it is, therefore

ADJUDGED and ORDERED that the memorandum opinion of the Court, dated September 10, 1970, be, and the same is hereby filed and made a part of the record in this action, and that the decision of the Secretary of Health, Education, and Welfare, applying the offset provisions of Section 224 of the Social Security Act be, and the same is hereby reversed, and the proposed offset by the Secretary against the plaintiff be, and it is hereby denied.

And be it further ADJUDGED and ORDERED:

(1) That counsel for the defendant shall promptly file with the Court a report stating the amount of the initial past due benefits to be paid the plaintiff and/or any ancillary beneficiaries, pursuant to ths judgment order. A copy of such report shall be furnished by the defendant to counsel for the plaintiff; and

(2) That counsel for the plaintiff shall, within fifteen (15) days of the entry of this judgment order, file with the Court a verified petition for the approval and allowance of a fee for representing the plaintiff in this Court, pursuant to the provisions of Section 206(b)(1) of the Social Security Act, as amended July 30, 1965, 42 U.S.C.A. 406(b)(1), exhibiting therewith the original or a duplicate-original of any written contract of employment between the attorney and the plaintiff, and in any event, showing (a) what services were rendered by the attorney in the case and specifically the amount of time he devoted to it in this Court; (b) what expenses, if any, were personally incurred by the attorney in the prosecution of the case in this Court and for which he has not been reimbursed by his client; and (c) what sums, if any, have been paid the attorney by the plaintiff or by anyone for the plaintiff for services rendered in this Court. The petition must also contain an affirmation by the attorney that he will neither demand, receive nor accept from the plaintiff or from anyone for the plaintiff, any fee or remuneration for services rendered in this case in this Court other than that approved and allowed by this Court pursuant to such petition.

And this case shall remain upon the docket until such statement of initial benefits shall have been received from the defendant and until the matters arising upon the petition for the approval and allowance of an attorney's fee to counsel for the plaintiff shall have been adjudicated.

ENTER: ....., 1970

.....

United States District Judge

## APPENDIX B

W. Va. Code, Chapter 23, Article 2, provides:

**Section 1. Employers and Employees, including State, Its Agencies and Political Subdivisions Subject to Chapter.**—The state of West Virginia and all governmental agencies or departments created by it, including county boards of education, are hereby required to subscribe to, and pay premiums into, the workmen's compensation fund for the protection of their employees, and shall be subject to all requirements of this chapter, and all rules and regulations prescribed by the commissioner with reference to rates, classification and premium payments.

All persons, firms, associations and corporations regularly employing other persons for the purpose of carrying on any form of industry, service or business in this state, including county courts, municipalities, other political subdivisions of the state, and civil defense organizations organized under article five, chapter fifteen of this code, are employers within the meaning of this chapter and subject to its provisions: Provided, That the provisions of section eight, article two of this chapter shall not apply to such county courts, municipalities, other political subdivisions of the state, or civil defense organizations organized as aforesaid: Provided, however, That the failure of such county courts, municipalities, other political subdivisions of the state, or civil defense organizations organized as aforesaid, to elect to subscribe to, and to pay premiums into, the workmen's compensation fund, shall not impose any liability upon them, or either of them, other than such liability as would exist notwithstanding the provisions of this chapter. All persons in the service of employers as herein defined, and employed by them for the purpose of carrying on the industry, business, service, or work in which they are engaged, including persons regularly employed in the state whose duties necessitate employment of a temporary or transitory nature by the same employer without the state, and

check-weighmen employed according to law, all members of rescue teams assisting in mine accidents with the consent of the owner who, in such case, shall be deemed the employer, or at the direction of the director of the department of mines, and all forest fire fighters who, under the supervision of the director of the department of natural resources or his designated representative, assist in the prevention, confinement and suppression of any forest fire, are employees within the meaning of this chapter and subject to its provisions: Provided further, That this chapter shall not apply to employers of employees in domestic service or persons whose employment is prohibited by law, nor to employees of an employer while employed without the state, except in case of temporary employment without the state as hereinbefore provided; nor shall a member of a firm of employers, or any official of an association or of a corporate employer, including managers, or any elective or appointive official of the state, county, courty court, board of education, municipality, other political subdivision of the state, or civil defense organization organized as aforesaid, whose term of office is definitely fixed by law, be deemed an employee within the meaning of this chapter: And provided further, That employers of not more than three employees for a period of not more than one month, who shall be called herein "casual employers", employers of employees in agricultural service and duly incorporated volunteer fire departments or companies may voluntarily elect to subscribe to, and pay premiums into, the workmen's compensation fund for the protection of the employees of such employers and all of the members, including the chief, commander or other officials thereof, of such duly incorporated volunteer fire departments or companies, and in such case shall be subject to all requirements of this chapter and all rules and regulations prescribed by the commissioner with reference to rates, classifications and premium payments, but such casual employers, employers of employees in agricultural service and duly incorporated volunteer fire departments or companies shall not be required to subscribe to the workmen's com-

pensation fund and their failure to subscribe to such fund shall not impose any liability upon them other than such liability as would exist notwithstanding the provisions of this chapter; nor shall the provisions of section eight of this article apply to casual employers, employers of employees in agricultural service or to such duly incorporated volunteer fire departments or companies.

The premium and actual expenses in connection with governmental agencies and departments of the state of West Virginia shall be paid out of the state treasury from appropriations made for such agencies and departments, in the same manner as other disbursements are made by such agencies and departments.

County courts, municipalities, other political subdivisions of the state, county boards of education, civil defense organizations organized as aforesaid, any duly incorporated volunteer fire departments or companies which shall elect to become subscribers to the workmen's compensation fund shall provide for the funds to pay their prescribed premiums into the fund, and such premiums, and premiums of state agencies and departments, including county boards of education, shall be paid into the fund in the same manner as herein provided for other employers subject to this chapter. In addition to its usual and ordinary meaning, the term "Employer" or "employers", as used in this chapter, shall be taken to extend to and include any duly incorporated volunteer fire department or company, or civil defense organization organized as aforesaid, which shall elect to subscribe to, and pay premiums into, the workmen's compensation fund, and in addition to its usual and ordinary meaning, the term "Employee" or "Employees", as used in this chapter, shall be taken to extend to and include all of the members of any such department, company or organization. All duly incorporated volunteer fire departments or companies, and civil defense organizations organized as aforesaid, which shall elect to subscribe to, and pay premiums into, such fund, shall be placed in a separate group or class of subscribers

to be established by the commissioner, and such departments, companies or organizations shall pay into the fund such premiums (computed, notwithstanding the provisions of section five of this article, on such basis as to the commissioner shall seem right and proper) as may be necessary to keep such group or class entirely self-supporting.

Any employer whose employment in this state is to be for a definite or limited period, which could not be considered "regularly employing" within the meaning of this section, may elect to pay into the workmen's compensation fund the premiums herein provided for, and at the time of making application to the commissioner such employer shall furnish a statement under oath showing the probable length of time the employment will continue in this state, the character of the work, an estimate of the monthly payroll, and any other information which may be required by the commissioner. At the time of making application such employer shall deposit with the state compensation commissioner to the credit of the workmen's compensation fund the amount required by section five of this article, which amount shall be returned to such employer, if his application be rejected by the commissioner. Upon notice to such employer of the acceptance of his application by the commissioner, he shall be an employer within the meaning of this chapter and subject to all of its provisions.

Any foreign corporation employer electing to comply with the provisions of this chapter and to receive the benefits hereunder, shall, at the time of making application to the commissioner, in addition to other requirements of this chapter, furnish such commissioner with certificate from the secretary of state showing that it has complied with all the requirements necessary to enable it legally to do business in this state, and no application of such foreign corporation employer shall be accepted by the commissioner until such certificate is filed.

For the purpose of this chapter, a mine shall be adjudged within thic state when the main opening, drift, shaft or slope is located wholly within this state.

Any employee within the meaning of this chapter whose employment necessitates his temporary absence from this state in connection with such employment, and such absence is directly incidental to carrying on an industry in this state, who shall have received injury during such absence in the course of and resulting from his employment, shall not be denied the right to participate in the workmen's compensation fund.

**Sec. 6. Exemption of Contributing Employers from liability.** — Any employer subject to this chapter who shall elect to pay into the workmen's compensation fund the premiums provided by this chapter shall not be liable to respond in damages at common law or by statute for the injury or death of any employee, however occurring, after such election and during any period in which such employer shall not be in default in the payment of such premiums and shall have complied fully with all other provisions of this chapter: Provided, That the injured employee has remained in his service with notice that his employer has elected to pay into the workmen's compensation fund the premiums provided by this chapter. The continuation in the service of such employer with such notice shall be deemed a waiver by the employee and by the parents of any minor employee of the right of action as aforesaid, which the employer or his or her parents would otherwise have.

**Sec. 6-a. Exemption from Liability of Officers, Managers, Agents, Representatives or Employees of Contributing Employers.**—The immunity from liability set out in the preceding section shall extend to every officer, manager, agent, representative or employee of such employer when he is acting in furtherance of the employer's business and does not inflict an injury with deliberate intention.

**Sec. 7. Notice to Employees; Waiver of Benefits of Chapter by Contract Prohibited.**—Each employer electing to pay the premiums provided by this chapter into the workmen's compensation fund, or electing to make direct payments of compensation as hereinafter provided, shall post and keep posted in conspicuous places about his place or places of business typewritten or printed notices stating the fact that he has made such election, and the same when so posted shall constitute sufficient notice to all his employees and to parents of any minor employees of the fact that he has made such election. No employer or employee shall exempt himself from the burden or waive the benefits of this chapter by any contract, agreement, rule, or regulation, and any such contract, agreement, rule or regulation shall be pro tanto void.

**Sec. 8. Election Not to Pay or Default in Payment of Premiums; Defenses Prohibited.**—All employers subject to this chapter, except the state of West Virginia and the governmental agencies or departments created by it, who shall not have elected to pay into the workmen's compensation fund the premiums provided by this chapter and have not elected to pay individually and directly or from benefit funds compensation and expenses to injured employees or fatally injured employees' dependents under the provisions of section nine of this article, or having so elected shall be in default in the payment of the same; or not having otherwise fully complied with the provisions of section five or section nine of this article, shall be liable to their employees (within the meaning of this article) for all damages suffered by reason of personal injuries sustained in the course of employment caused by the wrongful act, neglect or default of the employer or any of the employer's officers, agents or employees while acting within the scope of their employment and in the course of their employment and also to the personal representative of such employees where death results from such personal injuries, and in any action by any such employee or personal representative thereof, such defendant shall not avail himself of the following common

law defenses: The defense of the fellow - servant rule; the defense of the assumption of risk; or the defense of contributory negligence; and further shall not avail himself of any defense that the negligence in question was that of some one whose duties are prescribed by statute: Provided, however, That such provision depriving a defendant employer of certain common law defenses under the circumstances therein set forth shall not apply to an action brought against a county court, board of education, municipality, or other political subdivision of the state or against a casual employer or an employer of employees in agricultural service.

**Sec. 9. Election of Employer to Provide Own System of Compensation.**—Notwithstanding anything contained in this chapter, employers subject to this chapter who are of sufficient financial responsibility to insure the payment of compensation to injured employees and the dependents of fatally injured employees, whether in the form of pecuniary compensation or medical attention, funeral expenses or otherwise as herein provided of the value at least equal to the compensation provided in this chapter, or employers of such financial responsibility who maintain their own benefit funds, or system of compensation, to which their employees are not required or permitted to contribute, or such employers as shall furnish bond or other security to insure such payments, may, upon a finding of such facts by the compensation commissioner, elect to pay individually and directly, or from such benefit funds, department or association, such compensation and expenses to injured employees or fatally injured employees' dependents. The compensation commissioner shall require security or bond from such employer, to be approved by him, and of such amount as is by him considered adequate and sufficient to compel or secure to such employees, or their dependents, payment of the compensation and expenses herein provided for, which shall in no event be less than the compensation paid or furnished out of the state workmen's compensation fund in similar cases to injured employees or the dependents of fatally

injured employees whose employers contribute to such fund. Any employer electing under this section shall on or before the twentieth day of the first month of each quarter, for the preceding quarter, file with the commissioner a sworn statement of the total earnings of all his employees subject to this chapter for such preceding quarter, and shall pay into the workmen's compensation fund a sum sufficient to pay his proper proportion of the expenses of the administration of his chapter, as may be determined by the commissioner. The commissioner shall make and publish rules and regulations governing the mode and manner of making application, and the nature and extent of the proof required to justify the finding of facts by the commissioner, to consider and pass upon such election by employers subject to this chapter, which rules and regulations shall be general in their application. Any employer subject to this chapter who shall elect to carry his own rsik and who has complied with the requirements of this section and the rules of the compensation commissioner shall not be liable to respond in damages at common law or by statute for the injury or death of any employee, however, occurring, after such election and during the period that he is allowed by the commissioner to carry his own risk; provided the injured employee has remained in his service with notice given, as provided for in section seven of this article, that his employer has elected to carry his own risk as herein provided. The continuation in the service of such employer with such notice shall be deemed a waiver by the employee and by the parents of any minor employee of the right of action, as aforesaid, which the employee or his or her parents would otherwise have.

Any employer whose record upon the books of the compensation commissioner shows, a liability against the workmen's compensation fund incurred on account of injury to or death of any of his employees, in excess of premiums paid by such employer, shall not be granted the right, individually and directly or from such benefit funds, department or association, to compensate his injured employees and the dependents of his fatally injured

employees until he has paid into the workmen's compensation fund the amount of such excess of liability over premiums paid, including his proper proportion of the liability incurred on account of explosions, catastrophes or second injuries as defined in section one, article three of this chapter; occurring within the state and charged against such fund.

All employers who have heretofore elected, or shall hereafter elect, to pay compensation and expenses directly as provided in this section, shall, unless they give the catastrophe and second injury security or bond hereinafter provided for, pay into the surplus fund referred to in section one, article three of this chapter upon the same basis and in the same percentages, subject to the limitations herein set forth, as funds are set aside for the maintenance of the surplus fund out of payments made by premium-paying subscribers, such payments to be made at the same time as hereinbefore provided with respect to payment of proportion of expenses of administration. In case there be a catastrophe or second injury, as defined in section one, article three of this chapter, to the employees of any employer making such payments, the employer shall not be liable to pay compensation or expenses arising from or necessitated by the catastrophe or second injury, and such compensation and expenses shall not be charged against such employer, but such compensation and expenses shall be paid from the surplus fund in the same manner and to the same extent as in the case of premium-paying subscribers.

If an employer elects to make payments into the surplus fund as aforesaid, then the bond or other security required by this section shall be of such amount as the commissioner considers adequate and sufficient to compel or secure to the employees or their dependents payment of compensation and expenses, except any compensation and expenses that may arise from, or be necessitated by, any catastrophe or second injury, as defined in section one, article three of this chapter, which last are secured

by and shall be paid from the surplus fund as hereinbefore provided.

If any employer elect not to make payments into the surplus fund, as hereinbefore provided, then, in addition to bond or security in the amount hereinbefore set forth, such employer shall furnish catastrophe and second injury security or bond, approved by the commissioner, in such additional amount as the commissioner shall consider adequate and sufficient to compel or secure payment of all compensation and expenses arising from, or necessitated by, any catastrophe or second injury that might thereafter ensue.

All employers hereafter making application to carry their own risk under the provisions of this section, shall with such application, make a written statement as to whether such employer elects to make payments a aforesaid into the surplus fund, or not to make such payments and to give catastrophe and second injury security or bond hereinbefore in such case provided for.

All employers who have heretofore elected to carry their own risk under the provisions of this section shall be deemed to have elected to make payments into the surplus fund unless, within thirty days after the effective date of this act, they notify the commissioner in writing to the contrary: Provided, however, That such employers, as have heretofore elected, under the rules heretofore promulgated by the commissioner, not to make payments into the surplus fund, shall be deemed to have elected to give the catastrophe and second injury security or bond hereinbefore provided for and not to make payments into the surplus fund. Any catastrophe and second injury security or bond heretofore given under rules and regulations promulgated by the commissioner and approved by him shall be valid under this section, and any election heretofore made under the rules and regulations of the commissioner to make payments into the surplus fund shall be valid and protective to the person so electing

from and after the date of such election.

In any case under the provisions of this section that shall require the payment of compensation or benefits by an employer in periodical peyments, and the nature of the case makes it possible to compute the present value of all future payments, the commissioner may in his discretion, at any time compute and permit or require to be paid into the workmen's compensation fund an amount equal to the present value of all unpaid compensation for which liability exists, in trust; and thereupon such employer shall be discharged from any further liability upon such award, and payment of the same shall be assumed by the Workmen's Compensation Fund.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1970

70-53

No. ~~1091~~

ELLIOT L. RICHARDSON, SECRETARY OF HEALTH, EDUCATION AND WELFARE,
*Appellant*

v.

RAYMOND BELCHER

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

## BRIEF FOR UNITED MINE WORKERS OF AMERICA AS AMICUS CURIAE

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**No. 1091**

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**ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA**

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## BRIEF FOR UNITED MINE WORKERS OF AMERICA AS AMICUS CURIAE

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### INTEREST OF UNITED MINE WORKERS OF AMERICA

This brief *amicus curiae* is filed by United Mine Workers of America (called "UMW") with consent of the parties, as provided in Rule 42 of this Court's Rules.

UMW is an international labor union representing about 225,000 members who, since the early 1940's, have produced from 75 to 82 per cent of the bituminous coal industry's total production.

Regarded as one of the nation's most hazardous employments, as recently as 1969 the frequency rate of disabling injuries per 1,000,000 man-hours for underground coal mining was 31.86 and 9.36 for surface mining

as compared with 8.08 for all industries.[1] UMW's workmen's compensation departments of its various districts throughout the United States in the period 1964 through 1967 handled 37,068 claims; and during 1968's first six months, 6,946 claims were handled.[2] The annual report of the West Virginia Workmen's Compensation Fund for the year ending June 30, 1970, records (pp. 15, 28) that the State's coal mining industry reported 15,022 accidents, which represented 41 accidents per million dollars in wages.

Traditionally, union members have looked to their labor union for help in problems associated with their working conditions. This Court's *Lewis* v. *Benedict Coal Corporation,* 361 U.S. 459, 468 records recognition of UMW's long struggle to provide security for its members and their families to enable them to meet problems arising from unemployment, illness, and old age and death. As a service agency,[3] UMW's interest in its members' welfare, singly and collectively, does not cease when a member becomes injured. Its activities include enforcement of workmen's compensation statutes. *UMW, District 12* v. *Illinois State Bar Assn.,* 389 U.S. 217. Hence, where, as herein, a federal district court[4] has held unconstitutional the federal statute reducing the social security benefits to which UMW's members are entitled by offsetting therefrom workmen's compensation awards, UMW's interest in seeking to uphold the district court's rejection of the statute is manifest.

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[1]"*Accident Facts*", 1970 Ed., published by National Safety Council, 425 N. Michigan Avenue, Chicago, Illinois 60611, p. 26.

[2]Joint Report of the International Officers, Constitutional Convention, 1968, p. 90.

[3]*Local 357, Teamsters* v. *NLRB,* 365 U.S. 667, 675-76.

[4]United States District Court for the Southern District of West Virginia (at Bluefield). Its opinion is reported as *Belcher* v. *Richardson, Secretary of Health, Education and Welfare,* DC, S.D. W. Va., 1970, 317 F.Supp. 1294.

## ARGUMENT

### I. THE DISTRICT COURT CORRECTLY DETERMINED THAT THE SOCIAL SECURITY STATUTE'S OFFSET PROVISIONS ARE UNCONSTITUTIONAL.

#### A. The District Court Properly Adopted This Court's Rationale of *Goldberg* v. *Kelly*, Which Appellant Ignores.

Section 224 of the Social Security Act (Section 424a of Title 42, United States Code), together with the relevant Department of Health, Education and Welfare regulations, are set forth in Appendix B, pp. 24-41, of Appellant's Jurisdictional Statement.

Thereunder, for any month in which an individual under 62 years of age is entitled to both social security benefits and periodic workmen's compensation benefits under any federal or state law, that individual's social security benefits are required to be reduced by the amount by which the total benefits received under social security and workmen's compensation programs for the month exceeds the higher of 80 per cent of the individual's average current earnings or the total of certain other designated disability benefits. Because Appellee Belcher was receiving workmen's compensation benefits under West Virginia law, his disability benefits were reduced pursuant to Section 224. In a proceeding in the district court, Section 224 was held unconstitutional because a social security recipient has a "property right status", protected by the U.S. Constitution's Fifth Amendment's due process clause and Section 224 discriminated against Appellee Belcher by requiring reduction of social security benefits and depriving him of property without due process of law (J.S. App. A 11-19).[5]

[5]The abbreviation "J.S." refers to Appellant's Jurisdictional Statement herein. The abbreviation "J.S. App. A", followed by a page number, refers to the page in Appendix A to the Jurisdictional Statement.

Unless otherwise indicated, all emphases herein are supplied.

The district court regarded Appellee Belcher's claim that the statute's offset provisions deprived him of "property (benefits) without due process of law" to depend on whether he "has such an indefeasible right or interest in his social security benefits that the concept of due process precludes" their application (J.S. App. A 15).

The district court recognized this Court's majority holding in *Flemming* v. *Nestor*, 363 U.S. 603 (1960), with then-Chief Justice Warren and Justices Black, Brennan and Douglas dissenting (363 U.S. 621-40), that old-age benefits of an alien, deported for cause under the Immigration and Nationality Act, could be lawfully terminated without offending the Fifth Amendment's due process clause. But, relying upon this Court's majority ruling in *Goldberg* v. *Kelly*, 397 U.S. 254 (1970), which was written by Justice Brennan—a dissenter in *Nestor*—and which, as the district court declared, "tends to elevate entitlement to welfare to the status of a property right and to surround it with all the safeguards required by due process" (J.S. App. A 16), the district court concluded *Nestor "is no longer to be considered a viable and controlling precedent"* for the principle that "one who has contributed to the social security fund and later becomes eligible to receive the benefits provided by the Social Security Act has no indefeasible property right" thereto (J.S. App. A 17). In so holding, the district court noted this Court's supporting language that *"It may be realistic today to regard welfare entitlements as more like 'property' than a 'gratuity'"* (J.S. App. A. 16). Additionally, *Goldberg* declared, "Much of the existing wealth in this country takes the form of rights which do not fall within traditional common-law concepts of property" and " '[s]ociety today is built around entitlement' " (397 U.S. ....., 25 L.Ed 2d 295). *Appellant's*

*Jurisdictional Statement avoids and ignores all these significant words.*

Implementing *Goldberg's* rationale, the district court declared "it must be determined that one who has made direct contribution to the social security fund and becomes entitled to disability benefits thereunder should . . be accorded equal status and protection" (J.S. App. A 16).

The district court reasoned logically that it would be patently unfair for a welfare recipient under *Goldberg* to be accorded a "property right status" attended by due process safeguards, and yet to deprive a social security recipient of such status and protection under *Nestor.* Appropriately, the district court declared the "distinction" is both "illogical" and "grossly inequitable" (J.S. App. A 16-17).

The district court's holding, supported by *Goldberg*, is consistent with the dissent of Justice Black in *Nestor* in which he avowed that social security benefits are not gratuities but the "products of a contributory system . . from employees and employers alike", pointing to legislative history which recognized social security as an *"earned right"* (363 U.S. 631).[6]

Even prior to *Goldberg*, this Court had shifted from *Nestor. Shapiro* v. *Thompson*, 394 U.S. 618, 627, fn. 6, avowed "constitutional challenge cannot be answered by

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[6]Justice Black's dissent quotes a statement of Senator George, Chairman of the Senate Finance Committee, when the Social Security Act was passed. The quoted language appears in the district court's opinion (J.S. App. A 17), a portion thereof being (363 U.S. 631-32):

> "Social security is not a handout; it is not charity; it is not relief. It is an earned right based upon the contributions and earnings of the individual. *As an earned right, the individual is eligible to receive his benefit in dignity and self-respect.*"

the argument that public assistance benefits are a 'privilege' and not a 'right' ", a thesis adopted by *Goldberg* (397 U.S. 254); and *Sherbert* v. *Verner*, 374 U.S. 398, 404, declared "It is too late in the day to doubt that" constitutional rights "may be infringed by the denial of or placing of conditions upon a benefit or privilege".[7] Adherence to *Goldberg* is noted in *Daniel, Director, etc.* v. *Goliday*, 26 L.Ed 2d 57 (1970) and *Wheeler* v. *Montgomery*, 397 U.S. ....., 25 L.Ed 2d 307 (1970). See also *Hahn* v. *Burke*, 7 Cir., 430 F.2d 100.

Appellant's assertion that "*Goldberg* has no bearing upon the substantive validity of rational statutory limitations such as the qualification in Section 224 held invalid by the court below" (J.S. App. A 9) must be appraised in light of Appellant's disregard of *Goldberg's* language that "It may be realistic today to regard welfare entitlements as more like 'property' than a 'gratuity' " (*ante*, p. 4).

**B. The District Court Correctly Held That The Involved Workmen's Compensation Benefits Must Be Treated As A Contractual Entitlement.**

The West Virginia Workmen's Compensation Fund, as the district court correctly declared, though state-operated and to which employees make no direct monetary contributions, is sustained by contributions from employers voluntarily electing to come under the provisions of West Virginia Code, Chapter 23 (J.S. App. A 14).

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[7]In *Heikkila* v. *Celebrezze*, DC, N.D. Calif., 1963, 222 F.Supp. 629, where the wife of a deported alien was held entitled to social security benefits, *Nestor* was limited to its particular facts (pp. 631-32). In rejecting *Nestor's* thrust, the district court avowed it should not be extended "in creating an inequitable, unconscionable result as against an admittedly innocent citizen . . ." and would "work a punishment and penalty upon the widow" (p. 631).

The district court appropriately observed that under West Virginia authorities the workmen's compensation statute became "an integral part of the contract" of employment and emphasized the contractual nature of a workmen's compensation award.[8] Accord: *Reliford* v. *Eastern Coal Corp.*, 6 Cir. 260 F.2d 447, which recognized that an industry-wide collective bargaining contract in the coal industry, requiring employee coverage under workmen's compensation statutes, accorded affected employees a *contractual right.*

It is thus evident the district court correctly declared Appellee Belcher's workmen's compensation benefits could not be termed a "gratuity" but "rather they must be treated as a contractual entitlement" (J.S. App. A 14). Indeed, in *Truax-Traer Coal Co.* v. *Compensation Commissioner,* 123 W.Va. 621, 17 S.E. 2d 330 (1941), a workmen's compensation award was declared to be "in the nature of a judgment" and therefore "property" and "as such is the proper subject of constitutional protection" (p. 334).

**C. The District Court Correctly Held That Section 224 Deprived Appellee Belcher of Due Process and Equal Protection of the Law Under the Federal Constitution.**

The Fifth Amendment to the Constitution of the United States declares that no person shall "be deprived of . . property, without due process of law". The same Constitution's Fourteenth Amendment bars any State from similarly depriving any person.

Though *Nestor's* majority based its opinion mainly on the theory there is no "accrued property right" to social security benefits, it conceded (363 U.S. 611):

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[8]*Gooding* v. *Ott,* 77 W. Va. 487, 87 S.E. 862; *Lancaster* v. *State Compensation Commissioner,* 125 W.Va. 190, 23 S.E. 2d 601; *Hardin* v. *Workmen's Compensation Appeal Board,* 118 W.Va. 198, 189 S.E. 670.

> "This is not to say, however, that Congress may exercise its power . . free of all constitutional restraint. The interest of a covered employee under the Act is of sufficient substance to fall within the protection from arbitrary governmental action afforded by the Due Process Clause."

Thus, *Nestor* admits Section 224 is not beyond the reach of the Fifth Amendment's due process requirements and that labeling benefits granted as a "privilege" and not a "vested right" in no way removes the social security system from requirements of fairness and rationality expressed in the due process clause and does not insulate the statute from judicial review for constitutionality. Further, that the Fifth Amendment incorporates the fundamentals of equal protection of law is established under *Bolling* v. *Sharpe*, 347 U.S. 497, 499 (1954) and *Schneider* v. *Rusk*, 377 U.S. 163, 168 (1964), the latter avowing that "while the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is 'so unjustifiable as to be violative of due process' ".

This Court's *Sherbert* (374 U.S. 403) recognizes that only the gravest abuses, endangering paramount interests, give occasion for permissible limitation of constitutional rights and that no showing merely of a rational relationship to some colorable state or federal interest will suffice.

By congressional fiat Appellee Belcher was required to make tax contributions to social security in years of covered employment which, in part, were placed in the Federal Disability Insurance Trust Fund which Congress created [42 USCA 401(b)]. Now suffering disability from a work-connected injury, Belcher became and is entitled to receive workmen's compensation benefits. Under Section 224, social security benefits to which he

is admittedly entitled are reduced because of the receipt of workmen's compensation benefits. Still, another employee making the same social security tax contributions to the same Trust Fund and suffering a nonwork-connected disability is permitted by Congress to receive from the Trust Fund full social security benefits.

The district court accepted Appellee Belcher's argument that Section 224's offset provisions created arbitrary discrimination because two classes of disabled workers, essentially indistinguishable from each other except one is composed of disabled persons receiving workmen's compensation benefits and the other composed of disabled persons receiving benefits from private insurance plans or tort claim awards, so that on this sole difference benefits of the first class are reduced while those of the second class are left untouched (S. J. App. A 18).

The district court also accepted Appellee Belcher's contention that the offset provisions discriminated between those disabled prior to June 1, 1965 and those disabled after that date (J.S. App. A 18).

In rejecting Appellant's argument as to discrimination of the offset provisions on the ground that the purpose was to avoid duplication of public benefits, the district court declared "that no public funds are involved is made abundantly clear by" West Virginia Code, 23-3-1, which provides that the Workmen's Compensation Fund shall be supported by premiums and other funds paid thereto by employers, from which shall be paid all benefits due the employees or their dependents and expenses of administering the law (see Appendix A hereto) and that in West Virginia a workmen's compensation award is "an entitlement arising from a contractual relationship between employer and employee, sanctioned by law,

whereby each gave up a legal right in turn for a concomitant legal benefit" (J.S. App. A 18). Previous discussion herein (*ante*, pp. 6-7) demonstrates that Appellant's questioning (J.S. 7, fn. 8) of the district court's conclusion that workmen's compensation benefits are "private in nature" is abortive.

Further, the district court expressed its awareness of "several unreported decisions of district courts and . . *Bartley* v. *Finch*, 311 F.Supp. 876 (E.D. Ky. 1970)" which supported Appellant's position that Section 224 may be constitutionally applied, but rejected Appellant's invitation to accord "the issue raised in this case . . such cavalier treatment" because of *Goldberg* (J.S. App. A 16). In referring the Court herein (J.S. 7) to his Motion to Affirm in *Bartley* v. *Richardson*,[9] his citation of *Nestor* and *Dandridge* v. *Williams*, 397 U.S. 471, and argument that the involvement is only "with benefits provided by statute", and Appellant's citation herein of *Williamson* v. *Lee Optical Co.*, 348 U.S. 483 (J.S. 8, fn. 10), Appellant continues assiduously to ignore *Goldberg's* critical language (*ante*, p. 4).

Where, as herein, workmen's compensation and only workmen's compensation is chosen for the purpose of curtailing social security benefits, the district court's holding that Section 224 "cannot be constitutionally applied" because it deprives the social security applicant of due process and equal protection of the law under the Federal Constitution should be upheld by this Court (J.S. App. A 19).

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[9]See Motion to Affirm in Case No. 703, now pending in this Court, at pp. 4-5 and footnote 4.

## CONCLUSION

For the foregoing reasons, UMW urges that the opinion and judgment of the district court that the social security statute's offset provisions are unconstitutional are correct and this Court should sustain Appellee Belcher's Motion to Affirm and reject Appellant's request that probable jurisdiction should be noted.

Respectfully submitted,

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February, 1971

## APPENDIX A

### Workmen's Compensation Fund.

Chapter 23-3-1:

The commissioner shall establish a workmen's compensation fund from the premiums and other funds paid thereto by employers, as herein provided, for the benefit of employees of employers who have paid the premiums applicable to such employers and have otherwise complied fully with the provisions of section five [§23-2-5], article two of this chapter, and for the benefit, to the extent elsewhere in this chapter set out, of employees of employers who have elected, under section nine [§23-2-9], article two of this chapter, to make payments into the surplus fund hereinafter provided for, and for the benefit of the dependents of all such employees, and for the payment of the administration expenses of this chapter and shall adopt rules and regulations with respect to the collection, maintenance and disbursement of such fund not in conflict with the provisions of this chapter.

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# INDEX



## CITATIONS





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# In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1091

ELLIOT L. RICHARDSON, SECRETARY OF HEALTH, EDUCATION AND WELFARE, APPELLANT

*v.*

RAYMOND BELCHER

*ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA*

## BRIEF FOR THE APPELLANT

### OPINION BELOW

The opinion of the district court (App. 8–14) is reported at 317 F. Supp. 1294.

### JURISDICTION

The judgment of the district court declaring 42 U.S.C. 424a unconstitutional as applied to appellee Belcher was entered on September 14, 1970 (App. 14–15). Notice of appeal was filed on October 13, 1970 (App. 16) and probable jurisdiction was noted on March 1, 1971 (App. 19). The jurisdiction of this

Court is conferred by 28 U.S.C. 1252. *Flemming* v. *Rhodes,* 331 U.S. 100; *Flemming* v. *Nestor,* 363 U.S. 603, 604–08.

## QUESTION PRESENTED

Whether the provision in the Social Security Act requiring the reduction of social security disability benefits because of the simultaneous receipt of state workmen's compensation benefits is unconstitutional.

## STATUTES AND REGULATIONS INVOLVED

Section 424a of Title 42, United States Code (Supp. V) and the relevant Department of Health, Education and Welfare regulations are set forth in the Appendix to this Brief, *infra,* pp. 21–38.

## STATEMENT

Section 224 of the Social Security Act, 42 U.S.C. (Supp. V) 424a, provides for certain reductions in social security benefits where the recipient also receives workmen's compensation benefits. Appellee Raymond Belcher, a resident of West Virginia, was awarded monthly social security disability insurance benefits beginning in October 1968 of $329.70 per month[1] (App. 34, 38). In January 1969 the Social Security Administration of the Department of Health, Education and Welfare notified Belcher that $104.40 would be withheld from his monthly social security benefits because he was receiving $47.00 a week, or $203.60 a month, in state workmen's compensation, thereby reducing his monthly federal payments to

[1] This total included $156.00 for himself and $57.90 each for his wife and two children.

$225.30 (App. 26, 32, 35, 38). Upon reconsideration, the Social Security Administration determined that the initial reduction of Belcher's social security benefits was correct (App. 33–35).[2]

After a hearing (App. 19–30) the hearing examiner, upon *de novo* consideration of the case, upheld the reduction of Belcher's social security benefits, pursuant to Section 224 of the Social Security Act, because of his receipt of state workmen's compensation (App. 36–42). Belcher sought review of the hearing examiner's decision (App. 42–43) but, after consideration of the entire record, the Appeals Council denied review and the hearing examiner's decision became the final decision of the Secretary (App. 43–44).

Thereafter, Belcher brought this action in the district court under 42 U.S.C. 405(g), seeking review of the final administrative determination (App. 2–5). Belcher alleged that Section 224 is unconstitutional because: (1) it discriminates irrationally between recipients of workmen's compensation benefits, whose social security benefits are reduced, and all other recipients of benefits or awards, such as private insurance beneficiaries and successful tort plaintiffs, whose social security benefits are not reduced; and (2) it deprives him and his family of property, in the form of social security benefits for which he has at least partially paid through social security taxes,

[2] Belcher was represented by an attorney throughout the administrative proceedings, as well as before the district court.

without due process of law (App. 3–5).[3] Acting on the parties' motions for summary judgment (App. 7), the district court held that Section 224 unconstitutionally discriminates against Belcher by requiring the reduction of his social security benefits and that it deprives him of property without due process of law (App. 8–14).

## SUMMARY OF ARGUMENT

I. Section 224(a) of the Social Security Act provides for a reduction of social security benefits for recipients of workmen's compensation benefits. With the exception of the district court in this case, every court which has considered the constitutionality of Section 224(a) has upheld the statute.

Here the district court held that Section 224 improperly distinguishes between recipients of workmen's compensation benefits and recipients of awards such as private insurance proceeds and tort recoveries.

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[3] Belcher also alleged that Section 224 is unconstitutional because it arbitrarily requires the reduction of his social security benefits without taking account of attorney's fees paid by him in connection with his workmen's compensation claim. The district court did not rule on this allegation. At the administrative hearing, however, Belcher testified that he was not at that time paying any attorney's fee out of the workmen's compensation benefits he had been receiving (App. 27). Moreover, the Secretary will take into account the payment of such expenses, if they are identifiable, in computing the reduction. See 20 C.F.R. 404.408(d) reproduced in the Appendix to this Brief, *infra*, p. 32.

But, as this Court held in *Dandridge* v. *Williams,* 397 U.S. 471, a statutory classification in the area of social welfare is valid if it has a "reasonable basis." The legislative history of Section 224 demonstrates that the reduction requirement contained in that statute was reasonably designed to accomplish at least two goals—to rehabilitate the disabled worker and encourage him to return to productive work as soon as possible by avoiding the award of duplicating benefits, and to prevent the erosion or repeal of state workmen's compensation systems. Though arguably Congress might have gone further in promoting its goal of rehabilitation by also requiring reduction for receipt of benefits from private sources, this Court has frequently held that legislative reform is not invalid merely because it does not go far enough. *E.g., Williamson* v. *Lee Optical Company,* 348 U.S. 483.

II. In holding that Section 224 unconstitutionally deprives appellant of a property right without due process of law, the district court misapplied *Goldberg* v. *Kelly,* 397 U.S. 254. *Goldberg* held that welfare benefits of an individual cannot be terminated without an evidentiary hearing. Even if *Goldberg* were applicable to the disability benefits in question here, that case dealt only with the procedural rights of a person whose benefits are terminated because of alleged failure to meet statutory qualification. *Goldberg* has no bearing upon the substantive validity of a rational statutory limitation such as the qualification contained in Section 224.

422-024—71——2

## ARGUMENT

### I

### THE REDUCTION IN SOCIAL SECURITY BENEFITS TO REFLECT WORKMEN'S COMPENSATION PAYMENTS REQUIRED BY SECTION 224 HAS A REASONABLE BASIS

Section 224(a) of the Social Security Act provides that for any month in which an individual under age 62 is entitled to both social security benefits and periodic workmen's compensation benefits under any federal or state law, such individual's social security benefits shall be reduced by the amount by which the total benefits received under the social security and workmen's compensation programs for that month exceeds the higher of: (a) 80 percent of the individual's "average current earnings"[4] or (b) the total of certain other designated disability benefits. The con-

[4] An individual's "average current earnings" is defined as the larger of the average monthly wage used for purposes of computing his benefits under 42 U.S.C. 423 or one-sixtieth of his total wages and self-employment income for the five consecutive years after 1950 when they were highest. The 1968 amendments (Pub. L. 90–248, Title I, Sec. 159(a), 81 Stat. 869) changed this clause to provide that when an individual's wages and self-employment income for the five consecutive years during which they were highest are used to compute his "average current earnings," then his actual earnings, rather than those earnings creditable for purposes of social security (which have an upper limit), are to be used.

Section 224(b) provides that, should such an individual receive a lump sum settlement as a substitute for or a commutation of periodic workmen's compensation benefits, the reduction "shall be made at such time or times and in such amounts as the Secretary finds will approximate as nearly as practicable the reduction prescribed by subsection (a)."

stitutionality of Section 224(a) has been litigated in numerous federal courts, all of which have upheld the statute.[5]

Here the district court held that Section 224 improperly distinguishes between recipients of workmen's compensation benefits, whose social security benefits are reduced, and all other recipients of benefits or awards, such as private insurance beneficiaries

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[5] In addition to *Bartley* v. *Finch*, 311 F. Supp. 876 (E.D. Ky.), presently on appeal to this Court, *Bartley* v. *Richardson*, No. 703, October Term, 1970, the constitutionality of Section 224 has been upheld in the following cases: *Nieves* v. *Secretary of HEW*, 1 CCH Unemployment Ins. Rptr., Fed. Matter No. 15,479 (Puerto Rico); *Gambill* v. *Finch*, 309 F. Supp. 1 (E.D. Tenn.); *Lofty* v. *Cohen* (E.D. Mich. Civ. No. 30916, decided March 25, 1970), affirmed, *Lofty* v. *Richardson* (C.A. 6, No. 20484, decided March 4, 1971); *Bailey* v. *Finch*, 312 F. Supp. 918 (N.D. Miss.); *Benjamin* v. *Finch* (E.D. Mich., Civ. No. 32816, decided May 26, 1970, pending before the Sixth Circuit, No. 20714); *Miley* v. *Finch* (E.D. Mich., Civ. No. 33560, decided June 12, 1970); *Gooch* v. *Finch* (S.D. Ohio, Civ. No. 6840, decided July 13, 1970; and *Rodatz* v. *Finch* (E.D. Ill., Civ. No. 69–170, decided September 8, 1970, pending before the Seventh Circuit, No. 18,954).

The following cases involving challenges to the constitutionality of Section 224 are pending: *Sheets* v. *Finch* (S.D. W. Va., Civ. No. BK 69–3); *Richards* v. *Richardson* (S.D. W. Va., Civ. No. 70–168–CH); *Cline* v. *Richardson* (S.D. W. Va., Civ. No. 1241), and *Walker* v. *Richardson* (S.D. W. Va., Civ No. 1243) (stayed pending decision in this Court in the instant case); *Gillenwater* v. *Richardson* (S.D. W. Va., Civ. No. 69–140–CH); *Copeland* v. *Finch* (W.D. Okla., Civ. No. 69–363); *Wren* v. *Finch* (W.D. Mich., Civ. No. 6171); *McAlonan* v. *Finch* (W.D. Mich., Civ. No. 6269); *Schuster* v. *Richardson* (W.D. Mich., Civ. No. 6381); *Haynes* v. *Richardson* (E.D. Mich., Civ. No. 35205); *Debkowski* v. *Richardson* (E.D. Pa., Civ. No. 70–2895); *Gross* v. *Richardson* (E.D. Ark., Civ. No. PB 70–C–132); and *Cantu* v. *Richardson* (N.D. Tex., Civ. No. CA 34187 B).

and successful tort plaintiffs, whose social security benefits are not reduced (App. 13–14). But under the rationale of *Dandridge* v. *Williams*, 397 U.S. 471, this distinction is valid. There this Court stated (p. 485):

> In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some "reasonable basis," it does not offend the Constitution simply because the classification "is not made with mathematical nicety or because in practice it results in some inequality." *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U.S. 61, 78. "The problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical, it may be, and unscientific." *Metropolis Theatre Co.* v. *City of Chicago*, 228 U.S. 61, 69–70. "A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." *McGowan* v. *Maryland*, 366 U.S. 420, 426.

See also, *McDonald* v. *Board of Election*, 394 U.S. 802, 809.

Although the alleged statutory discrimination challenged here is federal, these principles are equally applicable in determining whether a statutory classification violates the Due Process Clause of the Fifth Amendment. *Flemming* v. *Nestor*, 363 U.S. 603, 611; *Gruenwald* v. *Gardner*, 390 F. 2d 591, 592 (C.A. 2), certiorari denied, 393 U.S. 982. Of course, the "reasonable basis" test of equal protection and due process, rather than the more strict "compelling [state]

interest" test (see *Shapiro* v. *Thompson,* 394 U.S. 618, 634; *Carrington* v. *Rash,* 380 U.S. 89), is applicable to the instant case. For here, as in *Dandridge, supra,* we are not dealing with "freedoms guaranteed by the Bill of Rights" (397 U.S. at 484), but rather with benefits provided by statute. Thus, Section 224 is valid if there is a reasonable basis for requiring a reduction for workmen's compensation beneficiaries.

The legislative history of Section 224 demonstrates that there is a reasonable basis for the reduction requirement. The offset of workmen's compensation benefits against social security disability benefits was first suggested by the Advisory Council on Social Security in a 1948 report to the Senate Finance Committee proposing a system of social security disability benefits. The Advisory Council recommended that such benefits be suspended for any period for which workmen's compensation cash benefits are payable under any state or federal program because, "[i]f combined payments become a major fraction of prior earnings, the economic incentive for beneficiaries to return to work may be insufficient" (S. Doc. No. 162, 80th Cong., 2d Sess., p. 8).

A bill was introduced at that time to amend the Social Security Act to include temporary and permanent disability insurance benefits.[6] But provisions for

[6] In hearings on this bill before the Committee on Ways and Means of the House of Representatives, the following exchange concerning the bill's reduction requirement took place between Congressman Wilbur Mills and the then Commissioner of Social Security, Dr. Arthur Altmeyer:

"Mr. Mills. Workmen's compensation has been established as a substitute for common-law actions against employers. If you

disability insurance benefits were not added to the Social Security Act until the Social Security Amendments of 1956. Included in those amendments was the predecessor to Section 224, which would have required the full offset of workmen's compensation benefits against monthly disability insurance benefits.[7]

In 1958 the House Committee on Ways and Means recommended, and the Congress enacted, the repeal

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refuse [social security] cash sickness [benefits] in this type of case, it would be consistent to do the same thing when there is a common-law right against anybody—for example, a personal injury suit against a railroad—would it not? What I mean is this: the loss of wages is part of the damage always sought to be recovered and is included in the judgment when a judgment is rendered. Now, can you explain to the committee why the cash sickness benefits should be paid in the one case and denied in the other case?

"Dr. ALTMEYER. In the case of workmen's compensation, the average State law has specific provisions with regard to eligibility for the benefits and as regards the amount of the benefits. It would have an adverse effect upon workmen's compensation laws if the benefits were paid under a Federal law for an injury sustained in the course of one's employment that is compensable under a State workmen's compensation law. The tendency, of course, would be for the States to push more and more of the burden of workmen's compensation onto the sickness disability system. That is the reason."

(Hearings on H.R. 2893 Before the House Committee on Ways and Means, 81st Cong., 1st Sess., pt. 2, pp. 1270–1271. See also, *id.*, at pp. 1558–1559 (testimony of Professor Sumner H. Slichter).)

[7] See 70 Stat. 816–817; H. Rep. No. 1189, 84th Cong., 1st Sess., p. 6; H. Rep. No. 2936 (Conf. Rep.), 84th Cong., 2d Sess., p. 25. This section was upheld, without question as to its constitutionality, against attack by recipients of lump sum workmen's compensation settlements granted under the laws of Massachusetts and Illinois, respectively, in *Walters* v. *Flemming*, 185 F. Supp. 288 (D. Mass.), and *Knapczyk* v. *Ribicoff*, 201 F. Supp. 283 (N.D. Ill.).

of Section 224.[8] At the time of and subsequent to such repeal, numerous obections were made to the elimination of the offset provision. Most of them rested on the theory that to permit the payment of double disability benefits approaching or even exceeding earnings prior to the onset of the disability would defeat the basic purpose of the disability insurance program—to rehabilitate beneficiaries whenever possible and to encourage their return to productive work—and would weaken state workmen's compensation programs.[9]

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[8] Section 224 was repealed because it was believed that the duplication of disability benefits occurred so infrequently as not to warrant the undesirable results produced in individual cases by the offset provision (H. Rep. No. 2288, 85th Cong., 2d Sess., pp. 5, 13; S. Rep. No. 2388, 85th Cong., 2d Sess., pp. 4–5, 11; Pub. L. 85–840, Title II, Sec. 206, 72 Stat. 1025).

[9] See the following testimony: Hearings on H.R. 13549 Before the Senate Committee on Finance, 85th Cong., 2d Sess., pp. 241–242 (G. T. Fonda, Nat. Asso. of Mfrs.); 297 (letter of Greater Boston Chamber of Commerce); 319, 342–343, 346–347 (A. D. Marshall, U.S. Chamber of Commerce); 390 (E. R. Bartley, Ill. Mfrs. Asso.); and 398–400 (J. J. Maher, Commerce & Industry Asso. of New York); Executive Hearings on H.R. 1 Before the House Committee on Ways and Means, 89th Cong., 1st Sess., pp. 30–32; and Hearings on H.R. 6675 Before the Senate Committee on Finance, 89th Cong., 1st Sess., pp. 130–131, 146–153, 219–222 (A. J. Celebrezze, Secretary of HEW, W. J. Cohen, Asst. Secretary of HEW, and R. M. Ball, Commissioner of Social Security); *id.*, pp. 249–253 (K. T. Schlotterbeck, U.S. Chamber of Commerce); 258–260 (L. J. Dikovics, Council of State Chambers of Commerce); 363–367, 370–373 (M. Z. Eubank, Commerce & Industry Asso. of New York); 422 (R. E. King, Jr., Nat. Asso. of Life Underwriters); 543 (M. Eddy, Am. Life Convention and Life Insurers Conf.); 818–819 (P. D. Hill, Int'l. Asso. of Health Underwriters); 892–903 (J. D. Dorsett, Am. Insurance Asso.); 949–954 (J. A. Flynn, New York Shipping Asso.); 987, 990 (J. A. Mann,

In 1965 Congress gave further consideration to the offset of workmen's compensation benefits against disability insurance benefits. The House took no ac-

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Ill. State Chamber of Commerce) and 1030–1033 (W. A. Callahan, Int'l. Asso. of Industrial Accident Boards and Commissions). In 1965 L. J. Dikovics, representing the Council of State Chambers of Commerce, told a subcommittee of the Senate Committee on Finance that:

> Thousands of disabled workers today are receiving more tax-free income from social security disability benefits combined with State workmen's compensation benefits than they were earning before they became ill or were injured. * * * When tax-free social insurance benefits exceed earning power there is little incentive for a disabled person to accept the risk, pain, and struggle involved in attempting to become self-supporting again.
>
> A matter of equal concern is the impact of Federal disability payments on State workmen's compensation programs. Legislative proposals have been offered in several States (Colorado, Florida, Maryland, and Minnesota) to reduce workmen's compensation benefits by the amount of OASI disability benefits payable to a disabled worker. If other States follow this direction and section 303 of this bill is enacted, we believe it will be only a matter of time until State workmen's compensation programs are destroyed.
>
> If that happens, a major impetus for this country's remarkable achievements in occupational safety will be destroyed also. Workmen's compensation insurance costs are based on the actual loss experience of industry groups and of individual employers. This gives the employer a direct financial incentive to improve safety on the job. If workmen's compensation costs are absorbed into the social security program, employers without safety programs and those whose employment is hazardous would pay no more than those employers who have adopted safety programs or who have less hazardous employment. We strenuously object to any action which could have an adverse effect on safety programs and on the remarkable downswing in

tion in the first instance,[10] but the Senate Committee on Finance, prompted by data indicating that in 35 of the 50 states, the average combined amounts of social security benefits and workmen's compensation payments to a worker with a wife and two children *exceeded* the worker's take home pay while working (Hearings on H.R. 6675 Before the Senate Committee on Finance, 89th Cong., 1st Sess., p. 151; see also, *id.*, pp. 892–923), determined that immediate action was necessary.[11] In its report recommending the present version of Section 224, the Committee stated:

> Although there is some dispute as to the number of workers who receive benefits under these two programs and whether these payments are excessive, the committee believes that it is desirable as a matter of sound principle to prevent the payment of excessive combined benefits.[12]

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disabling accidents that has taken place over the last three decades.

* * * * *

Hearings on H. R. 6675 Before the Senate Committee on Finance, 89th Cong., 1st Sess., p. 259 (1965).

[10] The Committee on Ways and Means, while noting the expressions of concern over the payment of double benefits, determined to await the additional information on the overlap and its effects which it had requested of the Advisory Council on Social Security (H. Rep. No. 213, 89th Cong., 1st Sess., p. 90).

[11] Persons testifying in favor of immediate legislative action are listed in note 9, *supra*. The Secretary of Health, Education and Welfare opposed any legislatiye action until a more thorough study could be made. *Id.*, pp. 130–131, 146.

[12] The report continued:

> The committee believes that the provision it is recommending avoids the problems and inequities of the earlier offset provision in the social security law for reducing

The present version of Section 224 was adopted in conference (H. Rep. No. 682, 89th Cong., 1st Sess., pp. 63–64) and was added to the law as part of the Social Security Amendments of 1965, effective January 1, 1966 (Pub. L. 89–97, Title III, Sec. 335, 79 Stat. 406).

This legislative history reveals that Congress wanted to preserve the basic purpose underlying the social security disability insurance system—that of

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monthly disability benefits by the amount of any other benefit to which a worker was entitled under State workmen's compensation laws, which was in effect from July 1957 to July 1958, but was repealed then. The new offset provision recommended by the committee provides for a reduction in the social security disability benefit (except where the State workmen's compensation law provides for an offset against social security disability benefits) in the event the total benefits paid under the two programs exceed 80 percent of the worker's average monthly earnings prior to the onset of disability. Under this provision, the worker's average monthly earnings would be defined as the higher of (a) his average monthly wage used for purposes of computing his social security disability benefit or (b) his average monthly earnings, in employment covered by social security, during his highest 5 consecutive years after 1950. (In no event, however, would the total benefits payable with respect to a worker be reduced below the amount of the unreduced monthly social security benefits). This reduction formula would generally avoid the inequity encountered under the previous offset provision, where the reductions that were required frequently resulted in benefits that replaced no more than 30 percent or so of the worker's earnings at disablement.

* * * * *

S. Rep. No. 404, 89th Cong., 1st Sess., p. 100. See also *id.*, pp. 260–264.

rehabilitating the disabled worker and encouraging him to return to productive work as soon as he can—and that it feared the payment of excessive disability benefits would defeat that purpose. In addition, Congress wanted to prevent the erosion or repeal of state workmen's compensation systems, which it felt would eventually occur should the federal disability system duplicate the state systems. These congressional purposes provide a reasonable basis for the reduction requirement. Furthermore, the manner by which the reduction is carried out under Section 224 (as explained by the Senate Committee on Finance, *supra*, note 12) is reasonable. Section 224, then, satisfies the requirements of due process and equal protection.[13]

This conclusion is not undermined by the fact that the reduction is not made for private disability insurance beneficiaries or for successful tort plaintiffs. In order to achieve its purpose of avoiding excessive disability benefits, Congress might well have gone further and applied the reduction provision of Section 224 to those who receive compensation from private sources as well as to beneficiaries of workmen's compensation statutes. But, as this Court has frequently held, legislative reform is not invalid merely because it does not go far enough. "[T]he reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind."

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[13] In the only court of appeals decision on the issue to date, the constitutionality of Section 224 was upheld against an attack on equal protection grounds. *Lofty* v. *Richardson* (C.A. 6, No. 20484, decided March 4, 1971).

*Williamson* v. *Lee Optical Co.*, 348 U.S. 483, 489. See *Katzenbach* v. *Morgan*, 384 U.S. 641, 657.[14]

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[14] There is evidence that Congress, from the beginning of the social security disability insurance program, has tried not to discourage disability beneficiaries from procuring additional protection through private means, such as private insurance. See, *e.g.*, recommendation 2 of the Advisory Council on Social Security submitted to Congress in 1938 (Hearings on Social Security Amendments of 1939 Before the House Committee on Ways and Means, 76th Cong., 1st Sess., vol. 1, p. 37) and its explanation by Dr. Arthur Altmeyer, the Chairman of the Social Security Board (*id.*, vol. 3, p. 2286).

Moreover, in *Lofty* v. *Richardson*, *supra*, note 13, the Sixth Circuit suggested several additional reasons for requiring the reduction only for receipt of workmen's compensation benefits (slip opinion, pp. 12–13):

> The legislative history of this amendment shows a great many complaints were registered before Congress about Workmen's Compensation-Social Security double coverage. The record is devoid of any complaints at all about double coverage resulting from private insurance or negligence actions in courts. It is neither novel nor necessarily irrational for Congress to fail to act upon a problem about which they have received no complaints and have been supplied no information, even when Congress, as here, does act upon a somewhat parallel problem as to which it had both.
>
> Still another reason which might reasonably be conceived to justify the congressional classification is that administratively it would be relatively simple to enforce the Workmen's Compensation deductions, whereas separating out the wage benefits from civil damage judgments, or determining who had received private insurance benefits, might offer administrative problems of a serious nature.
>
> Finally, it is entirely conceivable to us that Congress may have considered Social Security benefits and Workmen's Compensation benefits to be more arguably duplicative of one another than could appropriately be claimed concerning Social Security benefits and the other two types of payments. Both Social Security and Workmen's Com-

We add only that the equal protection ground relied upon by the court below in invalidating the statute—that receipt of West Virginia workmen's compensation benefits, because they are private in nature, cannot constitutionally support the reduction of simultaneously received social security disability benefits—is unwarranted. Our argument in support of Section 224 in no way depends upon whether state workmen's compensation benefits are derived from public or private sources. Instead, our argument is that in effectuating the purposes of the social security disability system—namely, rehabilitating the disabled worker and encouraging him to return to productive work as soon as he is able, and preventing the erosion or repeal of state workmen's compensation systems—Congress rationally chose to reduce the social security payments to recipients of such duplicating benefits. Thus, even if the court's characterization of West Virginia workmen's compensation benefits as private in nature is correct—which is highly questionable [15]—that characterization does not render invalid the reduction of social security payments paid to state workmen's compensation beneficiaries.

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pensation programs are social welfare legislation. Private accident or disability insurance is a private contract, frequently paid for entirely by the recipient. And, of course, court awards for injuries are private rights derived from the common law involving the principle of compensation for negligence or fault.

[15] As in all other jurisdictions, both state and federal, the workmen's compensation system in West Virginia exists solely by virtue of state legislation (W. Va. Code, Chap. 23 (1966 ed.). Moreover, the West Virginia system is administered by

## II

### THE REDUCTION IN BENEFITS REQUIRED BY SECTION 224 DOES NOT DEPRIVE APPELLEE OF A PROPERTY RIGHT IN VIOLATION OF THE DUE PROCESS CLAUSE

The district court also held Section 224 unconstitutional on the ground that the statute deprives Belcher of a property right—his disability benefits—without due process of law. In support of this holding the court cited *Goldberg* v. *Kelly,* 397 U.S. 254, which held that the welfare benefits of an individual recipient cannot be terminated without an evidentiary hearing (*id.* at 260–261). According to the court below, the reasoning of *Goldberg*—which it construed as imbuing welfare benefits with a property-right status—applies equally to social security disability benefits and, consequently, Section 224 cannot constitutionally reduce Belcher's right to receive social security disability benefits (App. 9–12).

Even if *Goldberg* were extended to apply to the social security disability benefits in question here, however, the conclusion reached by the district court would not follow. In *Flemming* v. *Nestor,* 363 U.S. 603, this Court sustained the statutory termination of the social security old-age benefits of an alien deported

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a state commissioner (W. Va. Code, § 23–1–1) and operates solely because of the sanctions imposed by state law. Thus, while private employers may elect not to participate in the system (W. Va. Code, § 23–2–6), employers so deciding must provide their own method of compensation, which must be approved by the commissioner, and post sufficient bond to insure payment of compensation and expenses to their injured employees (W. Va. Code, § 23–2–9; see also, *id.*, § 23–2–8).

because of his membership in the Communist party, adding that an individual who has become eligible to receive benefits under the Social Security Act does not have an indefeasible property right to those benefits. The court below determined that *Goldberg* had implicitly overruled *Nestor* and required the invalidation of Section 224. But *Goldberg* dealt only with the procedural rights of a person whose benefits are terminated because of alleged failure to meet statutory qualifications; it has no bearing whatsoever upon the substantive validity of rational statutory limitations such as the qualification in Section 224 held invalid by the court below. As this Court observed in *Dandridge* v. *Williams, supra* (397 U.S. at 487):

> The Constitution may impose certain procedural safeguards upon systems of welfare administration, *Goldberg* v. *Kelly* * * *. But the Constitution does not empower this Court to second-guess state officials charged with the difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients. * * *

Thus, under *Nestor,* as under *Dandridge* v. *Williams, supra,* Congress could constitutionally reduce the social security benefits awarded to appellee and his family so long as that reduction was not based upon a patently arbitrary classification (363 U.S. at 611).

## CONCLUSION

For the reasons stated, the judgment of the district court should be reversed.

Respectfully submitted.

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APRIL 1971.

# APPENDIX

42 U.S.C. 424a provides:

§ 424a. REDUCTION OF DISABILITY BENEFITS THROUGH RECEIPT OF WORKMEN'S COMPENSATION.

(a) If for any month prior to the month in which an individual attains the age of 62—

(1) such individual is entitled to benefits under section 423 of this title, and

(2) such individual is entitled for such month, under a workmen's compensation law or plan of the United States or a State, to periodic benefits for a total or partial disability (whether or not permanent), and the Secretary has, in a prior month, received notice of such entitlement for such month,

the total of his benefits under section 423 of this title for such month and of any benefits under section 402 of this title for such month based on his wages and self-employment income shall be reduced (but not below zero) by the amount by which the sum of—

(3) such total of benefits under sections 423 and 402 of this title for such month, and

(4) such periodic benefits payable (and actually paid) for such month to such individual under the workmen's compensation law or plan, exceeds the higher of—

(5) 80 percentum of his "average current earnings", or

(6) the total of such individual's disability insurance benefits under section 423 of this title for such month and of any

monthly insurance benefits under section 402 of this title for such month based on his wages and self-employment income, prior to reduction under this section.

In no case shall the reduction in the total of such benefits under sections 423 and 402 of this title for a month (in a continuous period of months) reduce such total below the sum of—

(7) the total of the benefits under sections 423 and 402 of this title, after reduction under this section, with respect to all persons entitled to benefits on the basis of such individual's wages and self-employment income for such month which were determined for such individual and such persons for the first month for which reduction under this section was made (or which would have been so determined if all of them had been so entitled in such first month), and

(8) any increase in such benefits with respect to such individual and such persons, before reduction under this section, which is made effective for months after the first month for which reduction under this section is made.

For purposes of clause (5), an individual's average current earnings means the larger of (A) the average monthly wage used for purposes of computing his benefits under section 423 of this title, or (B) one-sixtieth of the total of his wages and self-employment income (computed without regard to the limitations specified in sections 409(a) and 411(b)(1) of this title) for the five consecutive calendar years after 1950 for which such wages and self-employment income were highest. In any case where an individual's wages and self-employment income reported to the Secretary for a calendar year reach the limitations specified in sections 409(a) and 411(b)(1) of this title, the Secretary under regulations shall estimate the total

of such wages and self-employment income for purposes of clause (B) of the preceding sentence on the basis of such information as may be available to him indicating the extent (if any) by which such wages and self-employment income exceed such limitations.

(b) If any periodic benefit under a workmen's compensation law or plan is payable on other than a monthly basis (excluding a benefit payable as a lump sum except to the extent that it is a commutation of, or a substitute for, periodic payments), the reduction under this section shall be made at such time or times and in such amounts as the Secretary finds will approximate as nearly as practicable the reduction prescribed by subsection (a) of this section.

(c) Reduction of benefits under this section shall be made after any reduction under subsection (a) of section 403 of this title but before deductions under such section and under section 422(b) of this title.

(d) The reduction of benefits required by this section shall not be made if the workmen's compensation law or plan under which a periodic benefit is payable provides for the reduction thereof when anyone is entitled to benefits under this subchapter on the basis of the wages and self-employment income of an individual entitled to benefits under section 423 of this title.

(e) If it appears to the Secretary that an individual may be eligible for periodic benefits under a workmen's compensation law or plan which would give rise to reduction under this section, he may require, as a condition of certification for payment of any benefits under section 423 of this title to any individual for any month and of any benefits under section 402 of this title for such month based on such individual's wages and self-employment income, that such individual certify (i) whether he has

filed or intends to file any claim for such periodic benefits, and (ii) if he has so filed, whether there has been a decision on such claim. The Secretary may, in the absence of evidence to the contrary, rely upon such a certification by such individual that he has not filed and does not intend to file such a claim or that he has so filed and no final decision thereon has been made, in certifying benefits for payment pursuant to section 405(i) of this title.

(f)(1) In the second calendar year after the year in which reduction under this section in the total of an individual's benefits under section 423 of this title and any benefits under section 402 of this title based or his wages and self-employment income was first required (in a continuous period of months), and in each third year thereafter, the Secretary shall redetermine the amount of such benefits which are still subject to reduction under this section; but such redetermination shall not result in any decrease in the total amount of benefits payable under this subchapter on the basis of such individual's wages and self-employment income. Such redetermined benefit shall be determined as of, and shall become effective with, the January following the year in which such redetermination was made.

(2) In making the redetermination required by paragraph (1) of this subsection, the individual's average current earnings (as defined in subsection (a) of this section) shall be deemed to be the product of his average current earnings as initially determined under subsection (a) of this section and the ratio of (i) the average of the taxable wages of all persons for whom taxable wages were reported to the Secretary for the first calendar quarter of the calendar year in which such redetermination is made, to (ii) the average of the taxable wages

of such persons reported to the Secretary for the first calendar quarter of the taxable year in which the reduction was first computed (but not counting any reduction made in benefits for a previous period of disability). Any amount determined under the preceding sentence which is not a multiple of $1 shall be reduced to the next lower multiple of $1.

(g) Whenever a reduction in the total of benefits for any month based on an individual's wages and self-employment income is made under this section, each benefit, except the disability insurance benefit, shall first be proportionately decreased, and any excess of such reduction over the sum of all such benefits other than the disability insurance benefit shall then be applied to such disability insurance benefit.

Part 404.408 of 20 C.F.R. provides:

§ 404.408 REDUCTION OF BENEFITS BASED ON DISABILITY ON ACCOUNT OF RECEIPT OF WORKMEN'S COMPENSATION

(a) *When reduction required.* Under section 224 of the Act, a disability insurance benefit to which an individual is entitled under section 223 of the Act for a month after 1965 and before the individual attains age 62 (and any monthly benefit for the same month payable to others under section 202 of the Act on the basis of the same earnings record) is reduced (except as provided in paragraph (b) of this section) by an amount as determined under paragraph (c) of this section if:

(1) The individual entitled to the disability insurance benefit is also entitled under a workmen's compensation law or plan of the United States or a State to a periodic benefit for such

month for a total or partial disability (whether or not permanent) and

(2) The Secretary has, in a month before such month, received notice of such entitlement for such month, and

(3) The period of disability involved began after June 1, 1965.

(b) *When reduction not made.* The reduction of a benefit otherwise required by paragraph (a) of this section is not made if the workmen's compensation law or plan under which the periodic benefit is payable provides for the reduction of such periodic benefit when anyone is entitled to a benefit under title II of the Act on the basis of the earnings record of an individual entitled to a disability insurance benefit under section 223 of the Act.

(c) *Amount of reduction*—(1) *General.* The total of benefits payable for a month under sections 223 and 202 of the Act to which paragraph (a) of this section applies is reduced (but not below zero) by the amount by which the sum of such total of benefits and such periodic benefits payable (and actually paid) for such month to such individual under the workmen's compensation law or plan exceeds the higher of:

(i) Eighty percent of his "average current earnings," as defined in subparagraph (3) of this paragraph, or

(ii) the total of such individual's disability insurance benefit for such month and all other benefits payable for such month based on such individual's earnings record, prior to reduction under this section.

(2) *Limitation on reduction.* In no case may the total of monthly benefits payable for a month to the disabled worker and to the persons entitled to benefits for such month on his earnings record be less than:

(i) The total of the benefits payable (after reduction under paragraph (a) of this section) to such beneficiaries for the first month for which reduction under this section is made, and

(ii) Any increase in such benefits which is made effective for months after the first month for which reduction under this section is made.

(3) *Average current earnings defined*—(i) *In general.* An individual's "average current earnings" for purposes of this section means the larger of:

(*a*) The average monthly wage used for purposes of computing the individual's disability insurance benefit under section 223 of the Act, or

(b) One-sixtieth of the total of such individual's wages and earnings from self-employment without the limitations under sections 209(a) and 211(b)(1) of the Act for the 5 consecutive calendar years after 1950 for which such wages and earnings from self-employment were highest. The extent by which such individual's wages and earnings from self-employment exceed the limitations under sections 209(a) and 211(b)(1) of the Act for any calendar year after 1950 is computed in accordance with the provisions of subdivision (ii) of this subparagraph. Any amount so computed which is not a multiple of $1 is reduced to the next lower multiple of $1.

(ii) *Method of determining calendar year earnings in excess of the limitations under sections 209(a) and 211(b)(1) of the Act*—(*a*) *In general.* For the purposes of subdivision (i)(*b*) of this subparagraph, the extent by which the wages or earnings from self-employment of an individual exceed the maximum amount of earnings creditable under sections 209(a) and 211(b)(1) of the Act in any calendar year after 1950 will ordinarily be estimated on the basis of the earnings information avail-

able in the records of the Administration. (See Subpart I of this part.) If an individual adduces satisfactory evidence of his actual earnings in any year, the extent, if any, by which his earnings exceed the limitations under sections 209(a) and 211(b)(1) of the Act shall be determined by the use of such evidence instead of by the use of estimates.

(b) *Estimated wage earnings—(1) One employer involved.* In any calendar year after 1950 in which wages are reported for an individual, the wages credited to his earnings record for each calendar quarter before the quarter in which the maximum amount creditable under section 209(a) of the Act is attained are deemed to be the individual's actual earnings for each such quarter. The amount of wages for the calendar quarter in which the maximum amount of earnings was attained and for each succeeding calendar quarter of that year, if any, in which the individual worked is deemed to be equal to the largest amount credited to his earnings account in that calendar year for any calendar quarter through the quarter in which the maximum amount of earnings was attained.

*Example.* In the year 1966 in which $6,600 is the maximum creditable earnings amount under section 209(a) of the Act. W worked for the XYZ Company. His earnings record shows the following amounts of wages:

| | |
|---|---|
| 1st quarter | $2,400 |
| 2d quarter | 2,550 |
| 3d quarter | 1,650 |
| 4th quarter | 0 |
| Total | 6,600 |

The maximum creditable earnings amount was reached in the third quarter. The amount of wages for that quarter and for the succeeding fourth quarter is deemed to equal the highest quarterly amount credited, i.e., the amount of $2,550 credited to the second quarter. Thus

W's total estimated wages for the year 1966 are determined as follows:

| | |
|---|---|
| 1st quarter | $2,400 |
| 2d quarter | 2,550 |
| 3d quarter | 2,550 |
| 4th quarter | 2,550 |
| Total | 10,050 |

(2) *Two or more employers involved.* In any calendar year after 1950 in which wages are reported for an individual by more than one employer, if the total wages reported by any employer equal or exceed the maximum amount of earnings creditable under section 209(a) of the Act, the total wages from such employer for the quarters in which the individual worked for that employer are estimated in accordance with the provisions of (*1*) of this subdivision (ii) (*b*).

*Example.* In the calendar year 1964 in which $4,800 is the maximum amount of earnings creditable under section 209(a) of the Act, A worked for four employers. The following amounts are creditable to his earnings record:

| | Employer No. 1 | Employer No. 2 | Employer No. 3 | Employer No. 4 | Total |
|---|---|---|---|---|---|
| 1st quarter | $1,400 | $1,200 | $0 | $0 | |
| 2d quarter | 1,200 | 1,200 | 150 | 300 | |
| 3d quarter | 2,200 | 1,200 | 0 | 1,800 | |
| 4th quarter | 0 | 1,200 | 250 | 2,700 | |
| | $4,800 | $4,800 | $400 | $4,800 | $14,800 |

Wages from Employer No. 1 reached the maximum in the third quarter. For this quarter and the succeeding fourth quarter, A's wages from Employer No. 1 are deemed to equal $2,200 in each of these two quarters. Wages from Employer No. 2 reached the maximum in the fourth quarter, but since all of the quarterly amounts credited are equal, there are no additional deemed wages. Since the total wages reported by Employer No. 3 never reached the

maximum, the actual amounts credited are deemed to be his total wages from such employer. Wages from Employer No. 4 reached the maximum in the fourth quarter. However, since this is the highest quarterly amount credited and there are no succeeding quarters, the total earnings from this employer are deemed to be the actual amounts credited. Thus, A's total wages for 1964 are estimated as follows:

| | Employer No. 1 | Employer No. 2 | Employer No. 3 | Employer No. 4 | Total |
|---|---|---|---|---|---|
| 1st quarter | $1,400 | $1,200 | $0 | $0 | |
| 2d quarter | 1,200 | 1,200 | 150 | 300 | |
| 3d quarter | 2,200 | 1,200 | 0 | 1,800 | |
| 4th quarter | 2,200 | 1,200 | 250 | 2,700 | |
| | $7,000 | $4,800 | $400 | $4,800 | $17,000 |

(c) *Estimated, earnings from self-employment.* In any such calendar year in which self-employment income is credited to an individual's earnings record and such credit equals the maximum amount of earnings creditable under section 211(b)(1) of the Act, the amount of earnings from self-employment for such individual's taxable year is deemed to equal his total net earnings from self-employment as shown in his tax returns on file in the records of the Administration.

*Example.* In the calendar year 1957 in which $4,200 is the maximum amount creditable as self-employment income under section 211(b)(1) of the Act, C has maximum self-employment income of $4,200 credited to his earnings record. C's self-employment tax return for 1957 shows net earnings from self-employment of $8,300. Thus, C's earnings from self-employment are deemed to equal $8,300 for 1957.

(d) *Wages and self-employment income involved.* In any such calendar year, in which both wages and self-employment income are credited to an individual's earnings record, the amount of such individual's total earnings for such calendar year is deemed to equal the total

of his wages as determined under the provisions of (*b*) of this subdivision and the amount of his net earnings from self-employment as determined under the provisions of (*c*) of this subdivision.

*Example.* For the calendar year 1967 in which $6,600 is the maximum creditable earnings under sections 209(a) and 211(b)(1) of the Act, D who was both employed and self-employed has the following amounts credited to his earnings record:

| | Wages | Self-employment income |
|---|---|---|
| 1st quarter | $1,500 | |
| 2d quarter | 1,500 | |
| 3d quarter | 1,500 | |
| 4th quarter | 1,500 | |
| | $6,000 | $600. |

Since the amount of wages credited do not equal or exceed the maximum amount creditable under section 209(a) of the Act, D's total wages for the year are deemed to be $6,000. However, the amount of net earnings from self-employment shown on D's self-employment tax return is $2,300. D's earnings from self-employment are deemed to equal net earnings from self-employment which he reported for the year. Thus, D's earnings for 1967 are estimated as follows:

| | |
|---|---|
| Wages | $6,000 |
| Net earnings from self-employment | 2,300 |
| Total | 8,300 |

(4) *Reentitlement to disability insurance benefits.* If an individual's entitlement to disability insurance benefits terminates and such individual again becomes entitled to disability insurance benefits, the amount of the reduction is again computed based on the figures specified in this paragraph (c) applicable to the subsequent entitlement.

(d) *Items not counted for reduction.* Amounts included in the workmen's compensation award which are specifically identifiable as being for medical, legal or related expenses paid or incurred by the individual in connection with his workmen's compensation claim, or the injury or occupational disease on which it is based, are excluded in computing the reduction under paragraph (a) of this section.

(e) *Certification by individual concerning eligibility for workmen's compensation payment.* Where it appears that an individual may be eligible for a periodic benefit under a workmen's compensation law or plan which would give rise to reduction under paragraph (a) of this section, the individual may be required, as a condition of certification for payment of any benefit under section 223 of the Act to any individual for any month, and of any benefit under section 202 of the Act for such month based on such individual's earnings record, to furnish evidence as requested by the Administration and to certify as to:

(1) Whether he has filed or intends to file any claim for such periodic benefit, and

(2) If he has so filed, whether there has been a decision on such claim. In the absence of evidence to the contrary, reliance may be placed upon a certification that he has not filed and does not intend to file such a claim, or that he has filed and no decision has been made, in certifying any benefit for payment pursuant to section 205(i) of the Act.

(f) *Workmen's compensation benefit payable on other than a monthly basis.* Where workmen's compensation benefits are paid periodically but not monthly, or in a lump sum as a commutation of or a substitute for periodic benefits, the reduction under this section is made at such time or times and in such amounts as the Administration determines will

approximate as nearly as practicable the reduction required under paragraph (a) of this section.

(g) *Priorities.* (1) For an explanation of when a reduction is made under this section where other reductions, deductions, etc., are involved, see § 404.402.

(2) Whenever a reduction in the total of benefits for any month based on an individual's earnings record is made under paragraph (a) of this section, each benefit, except the disability insurance benefit, is first proportionately decreased, and any excess of such reduction over the sum of all such benefits other than the disability insurance benefit is then applied to such disability insurance benefit.

*Example:* Under title II of the Act, A is entitled to a monthly disability insurance benefit of $122. His wife, B, and his two children, C and D, are entitled to monthly insurance benefits of $61 each. After adjustment for the family maximum under section 203(a) of the Act, the benefits are $122 for A and $50.60 for B, C, and D making a total of title II benefits of $273.80. In computing A's "average current earnings," it is determined that A's average monthly wage used in computing his benefit rate is $340, and his average monthly wage for his 5 years of highest earnings after 1950 is $400. Therefore, 80 percent of his "average current earnings" for purposess of the workmen's compensation deduction is $320.

A becomes entitled to workmen's compensation of $48 a week, which converted to a monthly rate amount to $208 a month (i.e., 4⅓ times $48). The total monthly benefits payable under title II of the Act ($273.80) plus the monthly workmen's compensation amount ($208) equals $481.80. The amount of the reduction for workmen's compensation is $161.80 ($481.80 minus $320); and the family benefit

payable is $112 ($273.80 minus $161.80 equals $112). (The same result is obtained by subtracting the workmen's compensation amount ($208) from the applicable limit ($320).)

In this example, the $161.80 reduction would be applied first against the three section 202 benefits ($50.60 times 3 equals $151.80) leaving $10 to be deducted from the disability insurance benefit.

(h) *Effect of changes in family composition.* The addition or subtraction in the number of beneficiaries in a family may cause the family benefit to become, or cease to be, the applicable limit for reduction purposes under this section. When the family composition changes, the amount of the reduction is recomputed as though the new number of beneficiaries were entitled for the first month the reduction was imposed, i.e., the same average monthly wage, average current earnings, and workmen's compensation amount and the total benefits payable under title II of the Act for the new number of beneficiaries which would have been subjected to reduction for that first month are used. If the applicable limit both before and after the change is 80 percent of the average earnings, the amount payable remains the same and is simply redistributed among the beneficiaries entitled on the same earnings record.

*Example:* F is entitled to disability insurance benefits of $110.30 based on an average monthly wage of $289. His wife, G, and his child, H, are entitled to benefits under section 202 of the Act of $55.20 each. F becomes entitled to workmen's compensation of $192 a month. His average monthly wage for his 5 years of highest earnings after 1950 is $260.

The applicable limit on total benefits payable under title II of the Act and workmen's compensation is $231.20 (i.e., 80 percent of F's

average current earnings). The amount payable is figured as follows:

| | | |
|---|---|---|
| Total title II benefits | $220.70 | $220.70 |
| Monthly workmen's compensation | 192.00 | |
| Less 80 percent of F's average current earnings | 412.70<br>231.20 | |
| Reduction amount | 181.50 | 181.50 |
| Amount payable | | 39.20 |

(Deducting the workmen's compensation amount ($192) from 80 percent of the average current earnings ($231.20) gives the same amount payable ($39.20).)

Later, another child, J, becomes entitled on F's earnings record and the benefits after adjustment for the family maximum but before reduction for the workmen's compensation become $110.30 to F, and $40.90 to G, H, and J each. Since the total family benefit is now higher than 80 percent of F's average current earnings, the total family benefit becomes the applicable limit and the amount payable is figured merely by deducting the workmen's compensation ($192) from the total title II benefits ($233) leaving $41 payable to F.

(i) *Effect on benefit increases.* Any increase in benefits due to a recomputation or a statutory increase in benefit rates is not subject to the reduction for workmen's compensation and does not change the amount to be deducted from the family benefits. The increase is simply added to what amount if any is payable. If a new beneficiary becomes entitled to monthly benefits on the same earnings record after the increase, the amount of the reduction is redistributed among the new number of beneficiaries entitled under section 202 of the Act and deducted from their current benefit rate.

*Example:* K is entitled to disability insurance benefits of $118.80 and his wife, L, and his two children, M and N, are entitled to benefits under section 202 of the Act of $47.90 each (after reduction under section 203(a) to conform to the family maximum of $262.40). K becomes entitled to workmen's compensation of $30 per week ($130 per month). The total family benefit is higher by 10 cents than 80 percent of K's average current earnings (80 percent of $328, or $262.40). Therefore, the reduction amount equals the monthly workmen's compensation. One-third of this amount (rounded downward to the nearest 10 cents), i.e., $43.30, is deducted from L, M, and N's benefits leaving benefits payable as follows: $118.80 to K, and $4.60 each to L, M, and N.

Beginning in September 1966, a statutory increase raises K's disability insurance benefit to $122 and causes L, M, and N's benefits to be increased to $50.60 each (an increase of $2.70). The benefits then payable become: $122 to K, and $7.30 (i.e., $4.60 plus $2.70) each to L, M, and N.

In February 1967, O, another child of K, becomes entitled to benefits under section 202 of the Act based on K's earnings record. The benefits payable now become $122 to K, and $37.90 each to L, M, N, and O. The amount to be deducted from the family remains the same, $130, but is to be divided among four beneficiaries instead of three. Deducting one-fourth of $130 ($32.50) from $37.90 leaves $5.40 each to L, M, N, and O, and $122 to K.

(j) *Redetermination of benefits*—(1) *General.* In the second calendar year after the year in which reduction under this section in the total of an individual's benefits under section 223 of the Act and any benefits under section 202 of the Act based on his wages and self-employment income is first required (in a continuous period of months), and in each third

year thereafter, the amount of such benefits which are still subject to reduction under this section are redetermined, provided such redetermination does not result in any decrease in the total amount of benefits payable under title II of the Act on the basis of such individual's wages and self-employment income. Such redetermined benefit is effective with the January following the year in which the redetermination is made.

(2) *Average current earnings.* In making the redetermination required by subparagraph (1) of this paragraph, the individual's "average current earnings" (as defined in paragraph (c)(3) of this section) is deemed to be the product of his average current earnings as initially determined under paragraph (c)(3) of this section and the ratio of:

(i) The average of the taxable wages of all persons for whom taxable wages were reported to the Secretary for the first calendar quarter of the calendar year in which such redetermination is made, to

(ii) The average of the taxable wages of such persons reported to the Secretary for the first calendar quarter of the taxable year in which the reduction was first computed (but not counting any reduction made in benefits for a previous period of disability). Any amount determined under the preceding sentence which is not a multiple of $1 is reduced to the next lower multiple of $1.

(3) *Effect of redetermination.* Where the applicable limit on total benefits previously used was 80 percent of the average current earnings, a redetermination under this paragraph may cause an increase in the amount of benefits payable. Also, where the limit previously used was the total family benefit, the redetermination may cause the average current earnings to exceed the total family benefit and thus become the new applicable limit. If for some other

reason (such as a statutory increase or recomputation) the benefit has already been increased to a level which equals or exceeds the benefit resulting from a redetermination under this paragraph, no additional increase is made. A redetermination is designed to bring benefits into line with current wage levels when no other change in payments has done so.

*Example*: Beginning January 1968, P is entitled to a disability insurance benefit of $140 and his wife, R, and child, S, are entitled to benefits under section 202 of the Act of $70 each. P becomes entitled to workmen's compensation of $208 per month. In this case, the applicable limit on the combined benefits is $360 (80 percent of P's average current earnings). Deducting the workmen's compensation amount of $208 from this limit leaves family benefits payable of $152 ($140 to P and $6 to R and S each). In 1970 a redetermination raises 80 percent of P's average current earnings to $380 effective January 1971. Thus, the family benefit payable becomes $172 ($380 minus $208). P's benefit is $140, and R's and S's benefits are $16 each.

If there had been a benefit increase in 1969 (either by a statutory increase or a recomputation) increasing P's benefit by $10 (to $150) and each other benefit by $5 (to $11) the family would already be receiving $172 ($150 plus $11 plus $11 equals $172) at the time of redetermination, so that they would not get an additional increase. If the 1969 benefit increase made less than $172 payable to the family, the redetermination would increase the benefit to $172. Any statutory increase that takes effect after the redetermination would be added to the total family benefit.

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ELLIOT L. RICHARDSON, Secretary of Health, Education and Welfare, *Appellant*,

v.

RAYMOND BELCHER

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**On Appeal From the United States District Court for the Southern District of West Virginia**

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## BRIEF FOR THE AMERICAN MUTUAL INSURANCE ALLIANCE, AMERICAN INSURANCE ASSOCIATION AND THE AMERICAN ASSOCIATION OF STATE COMPENSATION INSURANCE FUNDS AS AMICI CURIAE

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### INTEREST

This brief *amici curiae* is filed by the American Mutual Insurance Aliance (AMIA), the American Insurance Association (AIA), and the American Association of State Compensation Insurance Funds (AASCIF), with the consent of the parties, as provided in Rule 42 of the Court's Rules.

AMIA is an association of over 100 property and casualty insurance companies. Together they write almost one billion dollars annually in workmen's compensation insurance. This constitutes approximately 29 percent of the private workmen's compensation in the United States and represents almost 30 percent of their total property and liability insurance business.

AIA is also an association of over 100 property and casualty insurance companies. These companies write approximately $1.2 billion of workmen's compensation insurance annually. This constitutes 35 percent of the private workmen's compensation in the United States and represents approximately 15 percent of their total property and liability insurance business.

AASCIF is the association of state workmen's compensation insurance funds. Such state-created and state-administered funds presently exist in 18 states and represent approximately $850 million in insurance premiums annually. In six of these states, the state fund is "exclusive" (*i.e.,* employers are required in those states to insure their risks in the fund). In the remaining 12 states, the funds are "competitive" (*i.e.,* employers may elect to insure in the state fund, with a private insurance company, or to qualify as self-insurers). The state funds in all 18 states are members of AASCIF.

These associations and the companies which they represent are vitally concerned with the satisfactory operation of the nation's compensation system. They are interested in all matters affecting workmen's compensation and social security, since they believe it is important that the two systems be coordinated so that a proper development of each not be impeded. They

particularly want to insure that workmen's compensation laws continue to provide full and adequate protection and rehabilitation to those who are the victims of work-related disability.

As a result of their interest and long experience in this area, they are uniquely able to assist the Court by discussing the significance of Section 224 of the Social Security Act and the reasons why, from the point of view of the industry most intimately concerned, it is both reasonable and essential to the proper working of state workmen's compensation systems.[1] It is their position that the decision below, if allowed to stand, will jeopardize attainment of this goal.

## THE NATURE OF WORKMEN'S COMPENSATION IN THE UNITED STATES

Workmen's compensation laws have existed in the United States for some 60 years as an outgrowth of the inadequacies of the common law.[2] They have now been adopted by all states and the District of Columbia and are basically similar in concept, scope and operation.

Common to all these laws is the elimination of fault as the basis of liability. The workman or his family

[1] This brief will not discuss the authorities considered at length in the Jurisdictional Statement and Brief of the United States herein and in the Motion to Affirm, filed by the United States in *Bartley, et al.* v. *Richardson*, No. 703, O.T. 1970. We endorse the position of the United States on the constitutional issues as set forth therein.

[2] See generally, LANG, WORKMEN'S COMPENSATION INSURANCE, MONOPOLY OR FREE COMPETITION?, 3-10 (Richard D. Irwin, Inc. 1947); ANALYSIS OF WORKMEN'S COMPENSATION LAWS, 3 (Chamber of Commerce of the United States 1971).

is indemnified, regardless of fault, for injuries or death arising out of employment. The benefits include medical and hospital care, usually unlimited in time and amount, periodic payments to replace wages, and rehabilitation. In essence, workmen's compensation laws hold that employers should assume the costs of occupational disabilities and that the resulting economic losses should be considered costs of production.

The enactment of workmen's compensation was an important step forward in the protection of employees. For the employee, it eliminated the uncertainties of litigation, increased his financial security, and erased the employer's defenses of contributory negligence, assumption of risk and the fellow-servant rule. It provided employers with a much-needed method of dealing with the financial hazards and uncertainties of occupational injuries.

The United States Chamber of Commerce has pointed to six basic objectives of workmen's compensation laws:

1. Provide sure, prompt and reasonable income and medical benefits to work-accident victims, or income benefits to their dependents, regardless of fault;

2. Provide a single remedy and reduce court delays, costs and work loads—arising out of personal injury litigation;

3. Relieve public and private charities of financial drains—incident to uncompensated industrial accidents;

4. Eliminate payments of fees to lawyers and witnesses as well as time-consuming trials and appeals;

5. Encourage maximum employer interests in safety and rehabilitation—through appropriate experience rating mechanisms; and

6. Promote frank study of causes of accidents (rather than concealment of fault)—reducing preventable accidents and human suffering. [ANALYSIS OF WORKMEN'S COMPENSATION LAWS, 3 (Chamber of Commerce of the United States 1971).]

Most laws require employers to meet their workmen's compensation obligations either by insurance or by proving their financial capacity to act as self-insurers. Some laws permit or require employers to acquire insurance through state-established funds. Penalties are imposed for failure to provide required coverage.

## THE EXPANSION OF THE SOCIAL SECURITY LAWS TO INCLUDE DISABILITY BENEFITS

The original Social Security Act of 1935 did not provide for disability benefits. In 1956, Congress amended the law to provide for payment of benefits to those who were permanently and totally disabled and had attained the age of 50 but had not reached 65. Act of August 1, 1956, Pub. L. No. 84-880, § 103, 70 Stat. 848. The social security benefit payable to such an individual was reduced, however, by the amount of any periodic benefit payable to the recipient under a workmen's compensation law. *Id.*

This offset provision was repealed in 1958. Act of August 28, 1958, Pub. L. No. 85-840, § 206, 72 Stat. 1025. After two years' experience under the offset provision, Congress concluded that the provision could be eliminated since at that time there did not appear to be any serious duplication of benefits. At the same time, Congress further liberalized social security disability payments by providing benefits for dependents of disabled persons. 42 U.S.C. § 402. Congress again

expanded the range of beneficiaries in 1960 by eliminating the age 50 requirement. 42 U.S.C. § 423(a)(1)(B).

In 1965, Congress reinstated the workmen's compensation offset provision, but in a form different from the 1956 version. 42 U.S.C. § 424a. The 1956 provision required an offset of social security payments equal to the amount of workmen's compensation received. The 1965 provision required only that combined social security and workmen's compensation benefits could not exceed 80 percent of the "average current earnings" credited to the worker's social security account before disability. In adopting this provision, the Senate Finance Committee observed that it had "taken note of the concern that has been expressed by many witnesses in the hearings about the payment of disability benefits concurrently with benefits payable under State workmen's compensation programs." S. REP. No. 404, 89th Cong., 1st Sess. 1 *U.S. Code Cong. & Ad. News* 2040 (1965). The Committee found that it was "desirable as a matter of sound principle to prevent the payment of excessive combined benefits." *Id.* Under the new provision, a worker's benefits would never be reduced "below the amount of the unreduced monthly social security benefits." *Id.*

Moreover, in order to overcome the effect of inflation in wage levels and living costs, the offset provision now requires periodic automatic redetermination of "average current earnings." *Id.* at 2200. As a result, when wages and living costs increase, the amount of social security benefits to be offset is reduced or eliminated. Thus, the disabled worker is able to maintain the same standard of benefits. In addition, the level of disability benefits automatically increases with every basic social security increase.

At the start of 1970, 1,410, 900 disabled workers and their 1,151,000 dependents were receiving social security disability benefits.[3]

## THE NEED FOR THE OFFSET PROVISION

The offset is crucial to the success of rehabilitation programs under state laws, to the continuation of vigorous employer safety programs, and to the continuance and improvement of state workmen's compensation laws.

### The Offset Provision Is Crucial to the Success of State Rehabilitation Programs

A characteristic of all state workmen's compensation programs is provision for worker rehabilitation.[4] Rehabilitation has been defined as the "restoration of the handicapped workman to the fullest physical, mental, social, vocational and economic usefulness of which he is capable."[5]

Historically, the state workmen's compensation systems have provided the principal impetus for disabled worker rehabilitation. The AIA, AMIA, their member companies and the AASCIF have been leaders in developing rehabilitation programs and in urging more advanced state legislation in the area. In fact, the first clinics used exclusively for the physicial restoration of

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[3] *Research and Statistics Note No. 21, 1970* (U.S. Department of Health, Education and Welfare, November 23, 1970).

[4] Thirty-six states provide by statute for some form of rehabilitation. However, according to the Chamber of Commerce of the United States, "rehabilitation is provided in all states even if unspecified in the law." ANALYSIS OF WORKMEN'S COMPENSATION LAWS, *supra*, at 7, 30-31.

[5] *Report of the Rehabilitation Committee, International Association of Industrial Accident Boards and Commissions,* 170 (U.S. Bureau of Labor Standards, Bulletin 142)

workers in the United States were established by workmen's compensation insurance carriers.[6]

Rehabilitation gives the disabled worker the opportunity to regain his economic and social utility by returning to the ranks of the wage earners. It is equally important to employers, not only because of the advantages of restoring trained workers to their jobs, but also because the savings resulting from properly administered rehabilitation programs are passed on to employers in the form of reduced workmen's compensation rates. This results in a built-in incentive for both employers and their insurance carriers to maximize rehabilitation efforts.

Based upon their experience under the earlier provisions of the social security laws, the AIA, AMIA and AASCIF are convinced that the absence of an offset acts as a deterrent to the rehabilitation of a disabled worker. Their experience has demonstrated that which common sense suggests is true: efforts to motivate a disabled worker receiving through disability payments as much money as or more money than he had previously earned through working are frequently unsuccessful.

Under the existing levels of social security and workmen's compensation benefits, the lack of an offset provision will result in combined benefits in *excess* of average weekly take-home pay in 48 of 51 jurisdictions. As the following table demonstrates, only in three jurisdictions are combined social security and workmen's compensation benefits less than or equal to average weekly benefits—Alaska, 81%; California, 97%; and Ohio, 99%.

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[6] KULP & HALL, CASUALTY INSURANCE, 235 (Ronald Press Co. 1968).

| Jurisdiction | Average Weekly Take Home Pay (a) | Workmen's Compensation Maximum Weekly Benefit (b) | Combined Workmen's Compensation and Social Security Benefits (c) | Combined Benefits as Percentage of Take-home Pay |
|---|---|---|---|---|
| Alabama | $ 87.77 | $ 50.00 | $112.08 | 128% |
| Alaska | 179.26 | 82.55 | 144.63 | 81% |
| Arizona | 113.24 | 152.50 | 214.58 | 189% |
| Arkansas | 84.81 | 49.00 | 111.08 | 131% |
| California | 118.21 | 52.50 | 114.58 | 97% |
| Colorado | 102.21 | 59.50 | 121.58 | 119% |
| Connecticut | 111.39 | 80.00 | 142.08 | 127% |
| Delaware | 98.93 | 75.00 | 137.08 | 138% |
| Dist. of Col. | 105.34 | 70.00 | 132.08 | 125% |
| Florida | 94.61 | 56.00 | 118.08 | 125% |
| Georgia | 91.61 | 50.00 | 112.08 | 122% |
| Hawaii | 118.40 | 112.50 | 174.58 | 147% |
| Idaho | 106.49 | 99.00 | 161.08 | 151% |
| Illinois | 112.73 | 71.00 | 133.08 | 118% |
| Indiana | 103.11 | 57.00 | 119.08 | 115% |
| Iowa | 100.94 | 56.00 | 118.08 | 117% |
| Kansas | 101.02 | 56.00 | 118.08 | 117% |
| Kentucky | 96.05 | 52.00 | 114.08 | 119% |
| Louisiana | 102.02 | 49.00 | 111.08 | 109% |
| Maine | 90.79 | 73.00 | 135.08 | 149% |
| Maryland | 102.10 | 85.00 | 147.08 | 144% |
| Massachusetts | 108.12 | 88.00 | 150.08 | 139% |
| Michigan | 119.35 | 104.00 | 166.08 | 139% |
| Minnesota | 104.22 | 70.00 | 132.08 | 127% |
| Mississippi | 84.15 | 40.00 | 102.08 | 121% |
| Missouri | 101.33 | 52.00 | 120.08 | 118% |
| Montana | 113.35 | 65.00 | 127.08 | 112% |
| Nebraska | 98.13 | 55.00 | 117.08 | 119% |

| Jurisdiction | Average Weekly Take Home Pay (a) | Workmen's Compensation Maximum Weekly Benefit (b) | Combined Workmen's Compensation and Social Security Benefits (c) | Combined Benefits as Percentage of Take-home Pay |
|---|---|---|---|---|
| Nevada | 114.53 | 66.46 | 128.94 | 112% |
| New Hampshire | 97.43 | 67.00 | 129.08 | 132% |
| New Jersey | 102.90 | 91.00 | 153.08 | 149% |
| New Mexico | 102.58 | 48.00 | 110.08 | 107% |
| New York | 105.82 | 80.00 | 142.08 | 134% |
| North Carolina | 88.50 | 50.00 | 112.08 | 127% |
| North Dakota | 94.22 | 94.00 | 156.08 | 166% |
| Ohio | 119.20 | 56.00 | 118.08 | 99% |
| Oklahoma | 93.98 | 49.00 | 111.08 | 118% |
| Oregon | 114.50 | 62.50 | 124.58 | 109% |
| Pennsylvania | 105.43 | 60.00 | 122.08 | 116% |
| Rhode Island | 101.49 | 82.00 | 144.08 | 142% |
| South Carolina | 87.07 | 50.00 | 112.08 | 129% |
| South Dakota | 93.36 | 50.00 | 112.08 | 120% |
| Tennessee | 89.48 | 47.00 | 109.08 | 122% |
| Texas | 105.01 | 49.00 | 111.08 | 106% |
| Utah | 100.22 | 65.00 | 127.08 | 127% |
| Vermont | 98.23 | 61.00 | 123.08 | 125% |
| Virginia | 93.30 | 62.00 | 124.08 | 133% |
| Washington | 117.40 | 81.23 | 143.31 | 122% |
| West Virginia | 113.40 | 65.50 | 127.58 | 112% |
| Wisconsin | 101.13 | 79.00 | 141.08 | 139% |
| Wyoming | 95.53 | 63.46 | 125.54 | 131% |

(a) Average weekly wages less federal income and social security taxes (four deductions). Based upon wages of employees to whom compensation paid. National Council on Compensation Insurance, December 1969.

(b) As of December 1970. Includes maximum allowance for dependents, except in Massachusetts, Utah, Vermont and Wyoming, where benefits for additional dependents may be paid.

(c) Compensation benefits based upon a worker with a wife and two children. Social security benefits based upon average family monthly benefit as of December 1970 of $269.00, or $62.08 average weekly benefit. Source—Social Security Administration, U. S. Department of Health, Education and Welfare.

These computations, it should be noted, do not include medical payments, which are in addition to the wage replacement benefits, nor do they reflect the fact that workmen's compensation and social security benefits are not subject to taxation.

Congress enacted the offset provision in 1965 in order to restore some incentive toward rehabilitation. At the same time, Congress was liberal in its allowance so that the disabled worker would receive substantially what he had received from working. In addition, Congress provided for regular adjustment of the offset level so that benefits would keep pace with wages and the cost of living. Under these circumstances, the offset provision is a more than reasonable method of providing the essential incentive for rehabilitation.

**The Offset Provision Maximizes the Incentive to States To Improve Their Benefit Structures**

Although sophisticated employers are willing to accept reasonable higher compensation costs to insure that their employees will receive adequate support when injured, they are demanding greater efficiency in the benefit distribution mechanism. When duplication of benefits occurs, there is reluctance to upgrade state workmen's compensation laws.

Workmen's compensation laws in a number of states still lag in their benefit levels. Many individuals and groups have been working to improve these levels, and while such efforts have met with considerable success, continued improvement is necessary to keep pace with increases in the cost of living and improved wage scales.

There are specific examples of the way in which social security benefits reduce the pressures on the

states to provide full workmen's compensation benefits. For instance, since 1958, the year the offset provision was repealed, nine states increased benefits for temporary total disability (for which there is no social security coverage), but did not increase benefits for permanent total disability (for which there may be social security coverage).[8] It is significant that five of these nine jurisdictions first enacted this differential in 1959, the year following repeal of the original offset provision. Two states reduce workmen's compensation benefits when social security benefits are payable.[9]

Widow's benefits provide a further illustration of the chilling effect of social security. Workmen's com-

[8]

| State | Permanent Total Disability Benefit | Temporary Total Disability Benefit | Original Year of Enactment of Difference |
|---|---|---|---|
| Alaska | $73.45 | $127.00 | 1959 |
| California | 52.50 | 87.50 | 1959 |
| Illinois | 71.00 | 91.00 | 1965 |
| Iowa | 56.00 | 61.00 | 1959 |
| Missouri | 58.00 | 63.50 | 1959 |
| Montana | 60.00 After first 26 weeks of disability | 65.00 | 1969 |
| New York | 80.00 | 95.00 | 1968 |
| Ohio | 56.00 | 63.00 Payable for first 12 weeks of disability | 1967 |
| Oregon | 62.50 | 80.00 | 1959 |

[9] In New York, benefits may be awarded for loss of earnings in addition to loss of function—but these additional benefits are offset by 50% of any social security benefits [N.Y. Workmen's Compensation Law § 15(c)(v) (McKinney 1970)]. The Supreme Court of Colorado has construed the Workmen's Compensation Act, 1965 Perm. Supp. C.R.S. 1963, 81-12-1(4), to allow an employer to reduce payments under that Act when the employee becomes eligible for benefits under the Social Security Act. *Hurtado* v. *CF&I Steel Corporation*, — Colo. —, 449 P.2d 819 (1969).

pensation laws have been criticized because of inadequate provisions for survivor benefits for widows and children.[10] The lag in this area is easily traceable to the fact that the widows and children are entitled to social security benefits, so there is no incentive to extend workmen's compensation benefits to them.

Despite such limitations, workmen's compensation laws afford far broader protection than social security for worker injuries. It is the workers as a group who will be the ultimate losers if improvements in workmen's compensation benefits and coverage are discouraged. The decision below, unless reversed, will have precisely that effect. It could, we believe, contribute to the eventual demise of the workmen's compensation system.

**The Offset Provision Contributes Toward Maintenance of Employer Responsibility**

Workmen's compensation insurance is paid for by the employer, while social security contributions are made by both employer and employee. Thus, if social security assumes a greater proportion of disability compensation, the burden of providing for the injured workman will shift from employer to employee. Aside from its undesirable economic implications, this poses serious concern for job safety.

Because of the gearing of insurance premium costs to claim experience, the existence of workmen's compensation has given significant impetus to industrial

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[10] See ANALYSIS OF WORKMEN'S COMPENSATION LAWS, *supra*, at 26-27.

safety in the United States.[11] A reduction in accidents in a manufacturing plant serves to decrease the employer's insurance costs. However, if social security assumes a greater share of the disability benefit burden and the level of workmen's compensation is reduced, the significance of insurance cost is correspondingly reduced and, with it, the incentive for the development of vigorous and effective job safety programs.[12]

## CONCLUSION

The foregoing demonstrates the reasonableness of Congress' determination to readopt an offset provision to prevent excessive duplication of social security and workmen's compensation disability benefits. This provision strengthens the effectiveness of the state laws and prevents a negation of their goal of rehabilitation. Congress saw the wisdom of maintaining strong state-level programs and recognized that the proportion of federal benefits should be sufficiently restrained to insure that these programs not be weakened nor their purposes frustrated.

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[11] The National Safety Council computes that the frequency of industrial accidents has experienced a significant reduction which parallels the expansion of effective workmen's compensation laws. In 1926 the industrial accident frequency rating was 31.87. By 1965 this was reduced to 6.53. In addition, the severity rate also dropped during that time from 2,500 man days per 1,000,000 man hours of employment to 689 man days. CASUALTY INSURANCE, *supra*, at 172-173.

[12] The Occupational Safety and Health Act of 1970, — Stat. —, established the National Commission on State Workmen's Laws. The Commission is required to study and report to the President by July 31, 1972, concerning, among other things, the "relationship between workmen's compensation on the one hand, and old age, disability, and survivors insurance and other types of insurance, public or private, on the other hand" [Section 27(d)(1)(O)].

The present offset results in no inequity. In addition to medical payments (including rehabilitation), the permanently disabled worker receives wage replacement benefits that approximate the take-home wage pay which he earned before his injury. Additionally, through automatic adjustments, these benefits increase with inflation and can result in benefits beyond the pre-injury wage. The offset is not only reasonable but necessary.

Therefore, we urge that the Court grant the prayer of the United States and reverse the judgment of the court below.

Respectfully submitted,

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1970

No. 1091 70-53

ELLIOT L. RICHARDSON, SECRETARY OF HEALTH, EDUCATION AND WELFARE,
*Appellant*

v.

RAYMOND BELCHER

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

## BRIEF FOR UNITED MINE WORKERS OF AMERICA AS AMICUS CURIAE

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**No. 1091**

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ELLIOT L. RICHARDSON, SECRETARY OF HEALTH, EDUCATION AND WELFARE,

*Appellant*

v.

RAYMOND BELCHER

---

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA**

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## BRIEF FOR UNITED MINE WORKERS OF AMERICA AS AMICUS CURIAE

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### INTEREST OF UNITED MINE WORKERS OF AMERICA

This brief *amicus curiae* is filed by United Mine Workers of America (called "UMW") with consent of the parties, as provided in Rule 42 of this Court's Rules.

UMW is an international labor union representing about 225,000 members who, since the early 1940's, have produced from 75 to 82 per cent of the bituminous coal industry's total production.

Regarded as one of the nation's most hazardous employments, as recently as 1969 the frequency rate of disabling injuries per 1,000,000 man-hours for underground coal mining was 31.86 and 9.36 for surface mining

as compared with 8.08 for all industries.[1] UMW's workmen's compensation departments of its various districts throughout the United States in the period 1964 through 1967 handled 37,068 claims; and during 1968's first six months, 6,946 claims were handled.[2] The annual report of the West Virginia Workmen's Compensation Fund for the year ending June 30, 1970, records (pp. 15, 28) that the State's coal mining industry reported 15,022 accidents, which represented 41 accidents per million dollars in wages.

Traditionally, union members have looked to their labor union for help in problems associated with their working conditions. This Court's *Lewis* v. *Benedict Coal Corporation*, 361 U.S. 459, 468 records recognition of UMW's long struggle to provide security for its members and their families to enable them to meet problems arising from unemployment, illness, and old age and death. As a service agency,[3] UMW's interest in its members' welfare, singly and collectively, does not cease when a member becomes injured. Its activities include enforcement of workmen's compensation statutes. *UMW, District 12* v. *Illinois State Bar Assn.*, 389 U.S. 217. Hence, where, as herein, a federal district court[4] has held unconstitutional the federal statute reducing the social security benefits to which UMW's members are entitled by offsetting therefrom workmen's compensation awards, UMW's interest in seeking to uphold the district court's rejection of the statute is manifest.

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[1] "*Accident Facts*", 1970 Ed., published by National Safety Council, 425 N. Michigan Avenue, Chicago, Illinois 60611, p. 26.

[2] Joint Report of the International Officers, Constitutional Convention, 1968, p. 90.

[3] *Local 357, Teamsters* v. *NLRB*, 365 U.S. 667, 675-76.

[4] United States District Court for the Southern District of West Virginia (at Bluefield). Its opinion is reported as *Belcher* v. *Richardson, Secretary of Health, Education and Welfare*, DC, S.D. W. Va., 1970, 317 F.Supp. 1294.

## ARGUMENT

### I. THE DISTRICT COURT CORRECTLY DETERMINED THAT THE SOCIAL SECURITY STATUTE'S OFFSET PROVISIONS ARE UNCONSTITUTIONAL.

#### A. The District Court Properly Adopted This Court's Rationale of *Goldberg* v. *Kelly*.

Section 224 of the Social Security Act (Section 424a of Title 42, United States Code), together with the relevant Department of Health, Education and Welfare regulations, are set forth in the Appendix to Appellant's brief.

Thereunder, for any month in which an individual under 62 years of age is entitled to both social security benefits and periodic workmen's compensation benefits under any federal or state law, that individual's social security benefits are required to be reduced by the amount by which the total benefits received under social security and workmen's compensation programs for the month exceeds the higher of 80 per cent of the individual's average current earnings or the total of certain other designated disability benefits.

Because Appellee Belcher was receiving workmen's compensation benefits under West Virginia law, his disability benefits were reduced pursuant to Section 224.

The district court held that "in the circumstances of plaintiff's [Appellee's] case, the application of Section 224 cannot be constitutionally applied, since to do so would deprive him of due process and equal protection of the law under the Fifth and Fourteenth Amendments" to the Constitution of the United States (App. 13-14).[5]

[5]The abbreviation "App. ", followed by a page number, refers to the printed Appendix.

The district court's holding accorded with Appellee Belcher's contentions both in the district court proceedings (App. 3-4) and in Appellant's administrative proceedings (App. 20, 28-29, 39) as Appellee Belcher recites in his brief to be filed herein. UMW, as *amicus curiae*, endorses the district court's holding herein.

The district court regarded Appellee Belcher's claim that the statute's offset provisions deprived him of "property (benefits) without due process of law" to depend on whether he "has such an indefeasible right or interest in his social security benefits that the concept of due process precludes" their application (App. 11).

The district court recognized (App. 11) this Court's majority holding in *Flemming* v. *Nestor*, 363 U.S. 603 (1960), with then-Chief Justice Warren and Justices Black, Brennan and Douglas dissenting (363 U.S. 621-40), that old-age benefits of an alien, deported for cause under the Immigration and Nationality Act, could be lawfully terminated without offending the Fifth Amendment's due process clause. But, relying upon this Court's majority ruling in *Goldberg* v. *Kelly*, 397 U.S. 254 (1970), which was written by Justice Brennen—a dissenter in *Nestor*—and which, as the district court declared, "tends to elevate entitlement to welfare to the status of a property right and to surround it with all the safeguards required by due process" (App. 11), the district court concluded *Nestor "is no longer to be considered a viable and controlling precedent"* for the principle that "one who has contributed to the social security fund and later becomes eligible to receive the benefits provided by the Social Security Act has no indefeasible property right" thereto (App. 12). In so holding, the district court noted (App. 12) this Court's supporting language that *"It may be realistic today to regard welfare entitlements as more like 'property' than a 'gratuity'"* (397 U.S. 262, fn. 8). Additionally, *Goldberg declared*, "Much of the existing wealth in this country takes the form of rights which do not fall within traditional common-law concepts of property" and " '[s]ociety today is built around entitlement' " (397 U.S. 262, fn. 8).

*Notably, Appellant's brief avoids and ignores these significant words.*

Implementing *Goldberg's* rationale, the district court declared "it must be determined that one who has made direct contribution to the social security fund and becomes entitled to disability benefits thereunder should . . be accorded equal status and protection" (App. 12).

The district court reasoned logically it would be patently unfair for a welfare recipient under *Goldberg* to be accorded a "property right status" attended by due process safeguards, and yet to deprive a social security recipient of such status and protection under *Nestor* (App. 12). Appropriately, the district court declared the "distinction" is both "illogical" and "grossly inequitable" (App. 12).

The district court's holding, supported by *Goldberg*, is consistent with the dissent of Justice Black in *Nestor* in which he avowed that social security benefits are not gratuities but the "products of a contributory system . . from employees and employers alike", pointing to legislative history which recognized social security as an "*earned right*" (363 U.S. 631).[6]

Even prior to *Goldberg*, this Court had shifted from *Nestor*. *Shapiro* v. *Thompson*, 394 U.S. 618, 627, fn. 6, avowed "constitutional challenge cannot be answered by the argument that public assistance benefits are a 'privilege' and not a 'right' ", a thesis adopted by *Gold-*

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[6]Justice Black's dissent quotes a statement of Senator George, Chairman of the Senate Finance Committee, when the Social Security Act was passed. The quoted language appears in the district court's opinion (App. 12), a portion thereof being (363 U.S. 631-32):

"Social security is not a handout; it is not charity; it is not relief. It is an earned right based upon the contributions and earnings of the individual. *As an earned right, the individual is eligible to receive his benefit in dignity and self-respect.*"

*berg* (397 U.S. 254); and *Sherbert* v. *Verner*, 374 U.S. 398, 404, declared "It is too late in the day to doubt that" constitutional rights "may be infringed by the denial of or placing of conditions upon a benefit or privilege".[7] Adherence to *Goldberg* is noted in *Daniel, Director, etc.* v. *Goliday*, 398 U.S. 73 (1970) and *Wheeler* v. *Montgomery*, 397 U.S. 280 (1970).

**B. The District Court Correctly Held That The Involved Workmen's Compensation Benefits Must Be Treated As A Contractual Entitlement.**

The West Virginia Workmen's Compensation Fund, as the district court correctly declared, though state-operated and to which employees make no direct monetary contributions, is sustained by contributions from employers voluntarily electing to come under the provisions of West Virginia Code, Chapter 23 (App. 10).[8]

The district court appropriately observed that under West Virginia authorities the workmen's compensation

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[7]In *Heikkila* v. *Celebrezze*, DC, N.D. Calif., 1963, 222 F.Supp. 629, where the wife of a deported alien was held entitled to social security benefits, *Nestor* was limited to its particular facts (pp. 631-32). In rejecting *Nestor's* thrust, the district court avowed it should not be extended "in creating an inequitable, unconscionable result as against an admittedly innocent citizen . ." and would "work a punishment and penalty upon the widow" (p. 631).

[8]Pertinent statutory provisions relating to the West Virginia Workmen's Compensation Fund appear in the Appendix to Appellee Belcher's brief filed herein. These include the following sections of West Virginia Code, Chapter 23, Article 2:

Section 1, dealing with "Employers and Employees, including State, Its Agencies and Political Subdivisions Subject to Chapter";

Section 6, dealing with "Exemption of Contributing Employers from liability";

Section 6-a, dealing with "Exemption from Liability of Officers, Managers, Agents, Representatives or Employees of Contributing Employers";

Section 7, dealing with "Notice to Employees; Waiver of Benefits of Chapter by Contract Prohibited";

Section 8, dealing with "Election Not to Pay or Default in Payment of Premiums; Defenses Prohibited"; and

Section 9, dealing with "Election of Employer to Provide Own System of Compensation".

statute became "an integral part of the contract" of employment and emphasized the contractual nature of a workmen's compensation award.* Accord: *Reliford* v. *Eastern Coal Corp.*, 6 Cir., 260 F.2d 447, which recognized that an industry-wide collective bargaining contract in the coal industry, requiring employee coverage under workmen's compensation statutes, accorded affected employees a *contractual right.*

It is thus evident the district court correctly declared Appellee Belcher's workmen's compensation benefits could not be termed a "gratuity" but "rather they must be treated as a *contractual entitlement*" (App. 10). Indeed, in *Truax-Traer Coal Co.* v. *Compensation Commissioner*, 123 W.Va. 621, 17 S.E. 2d 330 (1941), a workmen's compensation award was declared to be *"in the nature of a judgment" and therefore "property" and "as such is the proper subject of constitutional protection"* (p. 334).

**C. The District Court Correctly Held That Section 224 Deprived Appellee Belcher of Due Process and Equal Protection of the Law Under the Federal Constitution.**

The Fifth Amendment to the Constitution of the United States declares that no person shall "be deprived of . . . property, without due process of law". The same Constitution's Fourteenth Amendment bars any State from similarly depriving any person.

Though *Nestor's* majority based its opinion mainly on the theory there is no "accrued property right" to social security benefits, it conceded (363 U.S. 611):

> "This is not to say, however, that Congress may exercise its power . . free of all constitutional re-

*Gooding v. Ott, 77 W. Va 487, 87 S.E. 862; *Lancaster* v. *State Compensation Commissioner*, 125 W. Va. 190, 23 S.E. 2d 601; *Hardin* v. *Workmen's Compensation Appeal Board*, 118 W. Va. 198, 189 S.E. 670.

straint. The interest of a covered employee under the Act is of sufficient substance to fall within the protection from arbitrary governmental action afforded by the Due Process Clause."

Thus, *Nestor* admits Section 224 is not beyond the reach of the Fifth Amendment's due process requirements and that labeling benefits granted as a "privilege" and not a "vested right" in no way removes the social security system from requirements of fairness and rationality expressed in the due process clause and does not insulate the statute from judicial review for constitutionality. Further, that the Fifth Amendment incorporates the fundamentals of equal protection of law is established under *Bolling* v. *Sharpe*, 347 U.S. 497, 499 (1954) and *Schneider* v. *Rusk*, 377 U.S. 163, 168 (1964), the latter avowing that "while the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is 'so unjustifiable as to be violative of due process' ".

This Court's *Sherbert* (374 U.S. 403) recognizes that only the gravest abuses, endangering paramount interests, give occasion for permissible limitation of constitutional rights and that no showing merely of a rational relationship to some colorable state or federal interest will suffice.

Congressional fiat required Appellee Belcher to make tax contributions to social security in years of covered employment which, in part, were placed in the Federal Disability Insurance Trust Fund which Congress created [42 USCA 401(b)].[10] Now suffering disability from a work-connected injury, Belcher became and is entitled to receive workmen's compensation benefits. Under Section 224, social security benefits to which

[10]The Act's Section 401(b) appears in the Appendix hereto, p. 1a.

he is admittedly entitled are reduced because of the receipt of workmen's compensation benefits. Still, another employee making the same social security tax contributions to the same Trust Fund and suffering a non-work-connected disability is permitted by Congress to receive from the Trust Fund full social security benefits.

The district court accepted Appellee Belcher's argument that Section 224's offset provisions created arbitrary discrimination between two classes of disabled workers, essentially indistinguishable from each other except one is composed of disabled persons receiving workmen's compensation benefits and other composed of disabled persons receiving benefits from private insurance plans or tort claim awards, so that on this sole difference benefits of the first class are reduced while those of the second class are left untouched (App. 13).

The district court also accepted Appellee Belcher's contention that the offset provisions discriminated between those disabled prior to June 1, 1965 and those disabled after that date (App. 13).

In rejecting Appellant's argument as to discrimination of the offset provisions on the ground that the purpose was to avoid duplication of public benefits, the district court declared "that no public funds are involved is made abundantly clear by" West Virginia Code, 23-3-1, which provides that the Workmen's Compensation Fund shall be supported by premiums and other funds paid thereto by employers, from which shall be paid all benefits due the employees or their dependents and expenses of administering the law (see Appendix B hereto, p. 3a) and that in West Virginia a workmen's compensation award is "an entitlement arising from a contractual relationship between employer and employee, sanctioned

by law, whereby each gave up a legal right in turn for a concomitant legal benefit" (App. 13).

Further, the district court expressed its awareness of "several unreported decisions of district courts and . . *Bartley* v. *Finch*, 311 F.Supp. 876 (E.D. Ky. 1970)" which supported Appellant's position that Section 224 may be constitutionally applied, but it rejected Appellant's invitation to accord "the issue raised in this case . . such cavalier treatment" because of *Goldberg* (App. 11).

Thus, in light of the district court's holding herein that a compensation award is a contractual entitlement and, as shown (*ante*, p. 7), is "property" to be constitutionally protected, Appellant's concession (Br. 16, fn. 14) that Congress has tried not to discourage *private insurance* and the Sixth Circuit's premise for validating Section 224 in *Lofty* v. *Richardson*, 6 Cir., No. 20484 (March 4, 1971) being "Private accident or disability insurance is a private contract" (Br. 16-17, fn. 14), emphasize the validity of the district court's holding herein, *Lofty's* error as it applies to the instant case, the inapplicability of Appellant's citation of *Williamson* v. *Lee Optical Co.*, 348 U.S. 483, 489 (Br. 16), of *Katzenbach* v. *Morgan*, 384 U.S. 641, 657 (Br. 16) and of *Dandridge* v. *Williams*, 397 U.S. 471 (Br. 8, 9, 19) for the proposition that legislative reform is not invalid merely because it does not go far enough or is imperfect, as well as the inaccuracy of Appellant's questioning the district court's characterization of West Virginia workmen's compensation benefits as private in nature (Br. 17).

Additionally, the inappositeness of *Lee Optical*, *Dandridge* and *Katzenbach*, is found in *Shapiro* (394 U.S. 618) where this Court held that absent a compelling

governmental interest a federal statute violated the Fifth Amendment's due process clause by imposing a discrimination which impinged upon the constitutional right to travel; and in *Sherbert* (374 U.S. 398) wherein it rejected a state court's construction of an unemployment compensation statute concerning benefits because of the involvement of a First Amendment right.

Appellant argues that Section 224's offset provisions have a reasonable basis since its legislative history reveals Congressional purpose was to preserve the Social Security Disability Insurance system's basic purpose of rehabilitating the disabled worker and encouraging his return to productive work, and that Congress wanted to prevent the erosion or repeal of state workmen's compensation systems.[11] But, just as federal policy is concerned with rehabilitation and opposes malingering, West Virginia statutes too are attuned to each of these situations. Rehabilitation is provided for in West Virginia Code, Chapter 23, Article 4, Section 9; and provisions for modification of awards upon application *by both employees and employers* are found in Chapter 23, Article 5, Sections la through lc of the same Code.[12] Hence, the possibility that the combined payments would defer rehabilitation appears fanciful rather than real and provides no reasonable basis for Section 224's discrimination.

Appellant's brief carefully avoids any reference to this Court's statements in *Goldberg* (*ante*, p. 4). Instead,

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[11]Title 20, Code of Federal Regulations §404.1528, provides, in part:

"An individual for whom a period of disability has been established . . . shall if requested to do so, present himself for and submit to examination or tests . . and shall submit medical reports and other evidence necessary for the purpose of determining whether such individual continues to be under a disability."

[12]These statutory provisions appear in Appendix B hereto.

Appellant presses upon this Court the current viability of *Nestor* (Br. 18-19), despite this Court's negating the importance of distinguishing the right-privilege doctrine (*ante*, pp. 5-6).

Appellant attacks the district court's holding that "*Goldberg* had implicitly overruled *Nestor*" on the ground that "*Goldberg* dealt only with the *procedural* rights of a person whose benefits are terminated" and "has no bearing whatever upon the *substantive* validity of rational statutory limitations such as the qualification in Section 224" (Br. 18-19); but Appellant's attack must be tested in light of Appellant's disregard of *Goldberg's* language that "It may be realistic today to regard welfare entitlements as more like 'property' than a 'gratuity' " and of this Court's adherence to *Goldberg* in *Daniel, Director, etc.* v. *Goliday*, 398 U.S. 73 (1970) following the Seventh Circuit's holding in *Goliday* that "*if it is necessary to cast the matter of (the receipt of) public aid (governmentally provided) to the needy in one or the other of the long-labored-with molds of privileges or rights, we must classify it as a right and we do so.*" *Goliday* v. *Robinson*, DC, N.D. Ill., 1969, 305 F.Supp. 1224, 1226.

Where, as herein, workmen's compensation and only workmen's compensation is chosen (*ante*, p. 9) for curtailing social security benefits, the district court's holding that Section 224 "cannot be constitutionally applied" because it deprives the social security applicant of due process and equal protection of the law under the Federal Constitution should be upheld by this Court.

## CONCLUSION

For the foregoing reasons, UMW urges that the opinion and judgment of the district court that the social security statute's offset provisions are unconstitutional are correct and should be affirmed.

Respectfully submitted,

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May, 1971

# APPENDIX

## APPENDIX A

42 USCA:

**§401. Federal old-age and survivors insurance trust fund and Federal disability insurance trust fund.**

* * * * *

(b) There is created on the books of the Treasury of the United States a trust fund to be known as the "Federal Disability Insurance Trust Fund". The Federal Disability Insurance Trust Fund shall consist of such amounts as may be appropriated to, or deposited in, such fund as provided in this section. There is appropriated to the Federal Disability Insurance Trust Fund for the fiscal year ending June 30, 1957, and for each fiscal year thereafter, out of any moneys in the Treasury not otherwise appropriated, amounts equivalent to 100 per centum of—

(1) (A) one-half of 1 per centum of the wages (as defined in section 3121 of Title 26, Internal Revenue Code of 1954) paid after December 31, 1956, and before January 1, 1966, and reported to the Secretary of the Treasury or his delegate pursuant to subtitle F of Title 26, Internal Revenue Code of 1954, (B) 0.70 of 1 per centum of the wages (as so defined) paid after December 31, 1965, and before January 1, 1968, and so reported, (C) 0.95 of 1 per centum of the wages (as so defined) paid after December 31, 1967, and before January 1, 1970, and so reported, and (D) 1.10 per centum of the wages (as so defined) paid after December 31, 1969, and so reported, which wages shall be certified by the Secretary of Health, Education, and Welfare on the basis of the records of wages established and maintained by such Secretary in accordance with such reports; and

(2) (A) three-eighths of 1 per centum of the amount of self-employment income (as defined in section 1402 of Title 26, Internal Revenue Code of 1954) reported to the Secretary of the Treasury or his delegate on tax returns under subtitle F of Title 26, Internal Revenue Code of 1954 for any taxable year beginning after December 31, 1956, and before January 1, 1966, (B) 0.525 of 1 per centum of the amount of self-employment income (as so defined) so reported for any taxable year beginning after December 31, 1965, and before January 1, 1968, (C) 0.7125 of 1 per centum of the amount of self-employment income (as so defined) so reported for any taxable year beginning after December 31, 1967, and before January 1, 1970, and (D) 0.825 of 1 per centum of the amount of self-employment income (as so defined) so reported for any taxable year beginning after December 31, 1969, which self-employment income shall be certified by the Secretary of Health, Education, and Welfare on the basis of the records of self-employment income established and maintained by the Secretary of Health, Education, and Welfare in accordance with such returns. As amended Dec. 30, 1969, Pub.L. 91-172, Title X, §1005, 83 Stat. 741.

* * * * *

## APPENDIX B

West Virginia Code:

**§23-3-1. Compensation fund; surplus fund; catastrophe and catastrophe payment defined; second injury and second injury reserve; compensation by employers.**

The commissioner shall establish a workmen's compensation fund from the premiums and other funds paid thereto by employers, as herein provided, for the benefit of employees of employers who have paid the premiums applicable to such employers and have otherwise complied fully with the provisions of section five [§23-2-5], article two of this chapter, and for the benefit, to the extent elsewhere in this chapter set out, of employees of employers who have elected, under section nine [§23-2-9], article two of this chapter, to make payments into the surplus fund hereinafter provided for, and for the benefit of the dependents of all such employees, and for the payment of the administration expenses of this chapter and shall adopt rules and regulations with respect to the collection, maintenance and disbursement of such fund not in conflict with the provisions of this chapter.

* * * *

**§23-4-9. Physical and vocational rehabilitation.**

In cases where an employee has sustained a permanent disability, or has sustained injuries likely to result in permanent disability, and such fact has been determined by the commissioner, and the employee can be physically and vocationally rehabilitated and returned to remunerative employment by vocational training, by the use of crutches, artificial limbs, or other approved mechanical appliances, or by medicines, medical, surgical, dental or hospital treatment, the commissioner shall forthwith, after due notice to the employer, expend such an amount as may be necessary for the aforesaid pur-

poses, not, however, in any case, to exceed the sum of twelve hundred dollars. No payment, however, shall be made for such purposes as provided by this section unless authorized by the commissioner prior to the rendering of such treatment.

In every case in which the commissioner shall order physical or vocational rehabilitation of a claimant as provided herein, the claimant shall, during the time he is receiving any vocational rehabilitation or rehabilitative treatment that renders him totally disabled during the period thereof, be compensated on a temporary total disability basis for such period, unless he is being paid compensation under an award granted prior to the time such rehabilitation is authorized by the commissioner. (1923, c. 58, §38; 1929, c. 71, §38; 1935, c. 78; 1937, c. 104; 1949, c. 136; 1961, c. 160.)

**§23-5-1a. Application by employee for further adjustment of claim—Objection to modification; hearing.**

In any case where an injured employee makes application in writing for a further adjustment of his claim under the provisions of section sixteen, article four [§23-4-16] of this chapter, and such application discloses cause for a further adjustment thereof, the commissioner shall, after due notice to the employer, make such modifications or changes with respect to former findings or orders in such claim as may be justified, and any party dissatisfied with any such modification or change so made by the commissioner shall, upon proper and timely objection, be entitled to a hearing, as provided in section one [§23-5-1] of this article. (1939, c. 137.)

**§23-5-1b. Same—Refusal to reopen claim; notice, appeal.**

If, however, in any case in which application for further adjustment of a claim is filed under the next pre-

ceding section [§23-5-1a], it shall appear to the commissioner that such application fails to disclose a progression or aggravation in the claimant's condition, or some other fact or facts which were not theretofore considered by the commissioner in his former findings, and which would entitle such claimant to greater benefits than he has already received, the commissioner shall, within sixty days from the receipt of such application, notify the claimant and the employer that such application fails to establish a prima facie cause for reopening the claim. Such notice shall be in writing and shall state the time allowed for appeal to the appeal board from such decision of the commissioner. The claimant may, within thirty days after receipt of such notice, apply to the appeal board for a review of such decision. (1939, c. 137.)

**§23-5-1c. Application by employer for modification of award—Objection to modification; hearing.**

In any case wherein an employer makes application in writing for a modification of any award previously made to an employee of said employer, and such application discloses cause for a further adjustment thereof, the commissioner shall, after due notice to the employee, make such modifications or changes with respect to former findings or orders in such form as may be justified, and any party dissatisfied with any such modification or change so made by the commissioner, shall upon proper and timely objection, be entitled to a hearing as provided in section one [§23-5-1] of this article. (1939, c. 137.)

## INDEX



## CITATIONS

Cases:

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1970

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**NO. 1091**

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ELLIOT L. RICHARDSON, SECRETARY OF HEALTH, EDUCATION AND WELFARE,
*Appellant*

*v.*

RAYMOND BELCHER, *Appellee*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

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## BRIEF FOR THE APPELLEE

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### OPINION BELOW

The opinion of the district court (Appendix 8-14) is reported at 317 F. Supp. 1294.

### JURISDICTION

The judgment of the district court declaring 42 U.S.C. 424a unconstitutional as applied to appellee Raymond Belcher was entered on September 14, 1970 (Appendix 9-16). Notice of appeal was filed on October 13, 1970 (Appendix 16) and probable jurisdiction was noted on March 1, 1971 (Appendix 19). The jurisdiction of this court is conferred by 28 U.S.C. 1252. *Flem-*

*ming* vs. *Rhodes,* 331 U.S. 100; *Flemming* vs. *Nestor,* 363 U.S. 603, 604-08.

## QUESTION PRESENTED

Whether the provisions of Title 42, U.S.C.A. 424(a), Public Law 89-97, Title 3, 335, 79 Stat. 406, and as amended on January 2, 1968, Public Law 90-248, Title 1, 159(a), 81 Stat. 869, commonly referred to as the Social Security Act, and the provisions therein contained requiring the reduction of disability insurance benefits under the Social Security Act of the appellee, Raymond Belcher, because of the simultaneous receipt of West Virginia Workmen's Compensation benefits may be constitutionally applied.

## STATUTES AND REGULATIONS INVOLVED

Title 42 U.S.C.A. 424(a), Public Law 89-97, Title 3, 335, 79 Stat. 406, and as amended January 2, 1968, Public Law 90-248, Title 1, 159(a) 81 Stat. 869, and the relevant Department of Health, Education and Welfare regulations set forth in appendix to appellant's brief, Pages 21 to 38.

## STATEMENT

Appellee, Raymond Belcher, a resident of West Virginia, was awarded a period of disability with disability insurance benefits commencing in October, 1968, in the amount of $329.70 per month, which included $156.00 per month for himself and $57.90 each for his wife and two children (Appendix 34-38). In January, 1969, the Social Security Administration of the Department of Health, Education and Welfare notified Belcher that $104.40 would be withheld from his monthly Social Security benefits because he was receiving $47.00 a week, or $203.60 a month, in State Workmen's Compensation benefits, thereby reducing his monthly Social Security payments to $225.30 (Appendix 26, 32, 35, 38). Upon reconsideration, the Social Security Administration affirmed the reduction of Belcher's Social Security

benefits on July 19, 1969 (Appendix 33-35).

The appellee requested a hearing. A hearing was held, and the Hearing Examiner of the Bureau of Hearings and Appeals, Social Security Administration, Department of Health, Education and Welfare, upheld the reduction of Belcher's Social Security benefits, pursuant to Section 224 of the Social Security Act, because of his receipts of State Workmen's Compensation benefits (Appendix 36-42). The appellee, Belcher, requested review of the Hearing Examiner's decision on November 3, 1969 (Appendix 42-43), and the Appeals Council of the Bureau of Hearings and Appeals, Social Security Administration, Department of Health, Education and Welfare, denied the appellee's request for review on January 20, 1970 (Appendix 43-44).

Belcher thereafter filed civil action in the United States District Court for the Southern District of West Virginia, at Bluefield, West Virginia, pursuant to 42 U.S.C. 405(g), seeking review of the final administrative decision upholding the reduction of his disability insurance benefits (Appendix 2-5). Belcher alleged that Section 224 of the Social Security Act in applying a formula which takes into consideration benefits received by him from the West Virginia Workmen's Compensation Act is unconstitutional because: (1) it discriminates irrationally between recipients of Workmen's Compensation benefits, whose Social Security benefits are reduced, and all other recipients of benefits or awards, such as private insurance beneficiaries and successful tort plaintiffs whose Social Security benefits are not reduced; (2) it deprives him and his family of property, in the form of Social Security benefits for which he has at least partially paid through Social Security taxes without due process of law; and (3) the Act discriminates against persons in the same class who have periods of disability established prior to June 1, 1965 and those having disability established after June 1, 1965, failing to provide equal protection to all people of the same class (Appendix 3-5).

The District Court, acting on motions for summary judgment by the parties, rendered an opinion that Section 224 cannot be constitutionally applied, since to do so would deprive him of due process and equal protection of the law under the Fifth and Fourteenth Amendments (Appendix 8-14). The District Court thereafter, on September 14, 1970, entered a judgment order reversing the decision of the Secretary of Health, Education and Welfare, applying the offset provisions of Section 224 of the Social Security Act (Appendix 14-15).

## SUMMARY OF ARGUMENT

The constitutional validity of Title 42, U.S.C.A., 424(a), is involved and may be found at Public Law 89-97, Title 3, 335, 79 Stat. 406, and amended January 2, 1968, Public Law 90-248, Title 1, 159(a), 81 Stat. 869. The text of this section, with the additions contained in the 1968 amendment, are as follows:

> "(a) If for any month prior to the month in which an individual attains the age of 62 -
>
> (1) such individual is entitled to benefits under Section 423 of this title, and
>
> (2) such individual is entitled for such month, under a Workmen's Compensation law or plan of the United States or a State, to periodic benefits for a total or partial disability (whether or not permanent); and the Secretary has, in a prior month, received notice of such entitlement for such month,
>
> the total of his benefits under Section 423 of this title for such month and of any benefits under Section 402 of this title for such month based on his wages and self-employment income shall be reduced (but not below zero) by the amount by which the sum of -

(3) such total of benefits under Sections 423 and 402 of this title for such month, and

(4) such periodic benefits payable (and actually paid) for such month to such individual under the Workmen's Compensation law or plan, exceeds the higher of -

(5) 80 percentum of his "average current earnings", or

(6) the total of such individual's disability insurance benefits under Section 423 of this title for such month and of any monthly insurance benefits under Section 402 of this title for such month based on his wages and self-employment income, prior to reduction under this section . . .

(Appendix, Appellant's brief, Pages 21 to 22).

The District Court, in holding that Section 224 of the Social Security Act is unconstitutional, stated:

(1) That Belcher, in meeting the requirements of the Social Security Act for disability purposes, established at that time a status or right to the receipt of benefits under said Act which cannot be reduced based on the receipt of monies or benefits from some other source having no relation to the administration of the Social Security Act, such as West Virginia Workmen's Compensation benefits, which is a voluntary plan by Belcher's employer to protect himself and prevent tort actions against him.

(2) That Section 224 of the Social Security Act requires discrimination between two classes of disabled workers essentially indistinguishable from each other, except that one is composed of those disabled persons who also receive Workmen's Compensation benefits, and

the other is composed of those disabled persons who also receive benefits from private disability insurance plans or tort claim awards, thus the law failing to provide equal protection.

The District Court, in holding Section 224 of the Social Security Act unconstitutional, properly held that *Flemming* vs. *Nestor,* 363 U.S. 603, was inapplicable, or was not to be considered a viable and controlling precedent, especially in view of the more recent holding in the case of *Goldberg* vs. *Kelly,* 379 U.S. 254, thus applying th. aw correctly to the facts and circumstances of the plaintiff-appellee's case.

## ARGUMENT

### 1. THE REDUCTION IN SOCIAL SECURITY BENEFITS REQUIRED BY SECTION 224 OF THE SOCIAL SECURITY ACT DEPRIVES APPELLEE OF A PROPERTY RIGHT IN VIOLATION OF DUE PROCESS.

Section 224(a) of the Social Security Act provides that for any month in which an individual under age sixty-two is entitled to both Social Security benefits and periodic Workmen's Compensation benefits under any federal and state law, such individual's Social Security benefits shall be reduced by the amount by which the total benefits received under the Social Security Act and the Workmen's Compensation program for that month exceeds the higher of: (a) 80% of the individual's "average current earnings"[1]; or (b) the total of certain other designated disability benefits.

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[1] An individual's "average current earnings" is defined as the larger of the average monthly wage used for the purpose of computing his benefits under 42 U.S.C. 423, or 1/60th of his total wages and self-employment income for the five consecutive years after 1950 when they were highest. The 1968 amendments (Public Law 90-248, Title 1, Section 159(a), 81 Stat. 869), changed this clause to

The District Court held that one who has made direct contributions to the Social Security fund and becomes entitled to disability benefits thereunder should and ought to be accorded equal status and protection for it seems to us to be patently unfair for the welfare recipient under *Goldberg* "to have a property right status" with all the procedural safeguards of due process while the Social Security recipient under *Nestor* is deprived of such status and protection. The distinction is not only completely illogical, but is grossly inequitable. Indeed it appears to run counter to the intent of Congress as reflected by the comments By Senator George, Chairman of the Senate Finance Committee, at the time of the passage of the Social Security Act concerning its purpose and character. Social Security is not a handout, it is not charity, it is not relief. It is an earned right based upon the contributions and earnings of the individual, 102 Congressional Record 15110. The District Court, in rendering its opinion, has said *Nestor* is no longer a viable and controlling precedent, and that this Court in *Goldberg* has said statutory entitlement once met has a property right status which must be protected by due process. The *Goldberg* vs. *Kelly* decision has three areas of tremendous significance: first, it tolls the death knell for right - privilege analysis as a valid test for determining whether governmental benefits can be terminated without a prior administrative hearing and adopts a more sophisticated balancing of interest test to determine the necessity for this prior hearing; second, it

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**Footnote 1 continued:**
provide that when an individual's wages and self-employment income for the five consecutive years during which they were highest are used to compute his "average current earnings", then his actual earnings, rather than those earnings creditable for purposes of Social Security (which have an upper limit), are to be used.

Section 224(b) provides that, should such an individual receive a lump sum settlement as a substitute for or a commutation of periodic Workmen's Compensation benefits, the reduction "shall be made at such time or times and in such amounts as the Secretary finds will approximate as nearly as practicable the reduction prescribed by subsection (a)."

applies this balancing test to cases of welfare termination or reduction to conclude that due process of law requires a prior hearing consonant with certain procedural due process requirements; thirdly, it is a precedent requiring a hearing before termination of Social Security benefits. If a person is qualified for welfare benefits, such benefits are a matter of statutory entitlement and the relevant constitutional restraints apply. Belcher has contributed 50% of the total amount of tax dollars in the way of Federal Insurance Contributions to the trust fund of the Social Security Act. Congress, in requiring Belcher and his employer to pay taxes into the trust fund, set up certain statutory requirements which Belcher must meet to be eligible to receive benefits from that fund based on disability. To permit the Social Security Administration to administer a fund involving the money of the recipient must require treatment that once he meets the statutory requirements, some other program having no logical connection or relation may not take away his benefits so long as he remains within the statutory requirements of disability under the Act. To permit the Legislature of West Virginia in establishing a Workmen's Compensation plan and fixing the weekly or monthly benefits thereunder, either on a compulsory or voluntary basis, would have the effect of permitting the Legislature of West Virginia under the application of Section 224 of the Social Security Act to determine the monthly amount of Social Security entitlement a recipient would receive once you have met the disability requirements of the Act. In other words, when the Legislature of West Virginia increases or decreases Workmen's Compensation benefits, it would increase or decrease Social Security benefits of a person eligible to receive benefits thereunder, and the Secretary of the Department of Health, Education and Welfare would have no control over this, under the application of Section 224. It would be equally true for the Legislature of West Virginia, or of the several states, under the application of Section 224 of the Social Security Act to reduce Workmen's Compensation benefits on a weekly or

monthly basis to require maximum benefits to be paid under the administration of the Social Security Act. Surely Congress did not intend that Section 224 should have such application, and surely Congress did not intend that the several State Legislatures should determine the monthly amount a disabled Social Security recipient is entitled to. Nevertheless, that is the hard cold facts. To permit some other legislative body to take action which would reduce or increase monthly benefits to which a disabled Social Security recipient is entitled to from a fund to which he has contributed his own money is the taking of property without due process of law in its worst form.

The appellant argues that Section 224 has a reasonable basis and may be constitutionally applied. The District Court, in answer to this, stated:

> "However, we are not convinced that the issue raised in this case deserves such cavalier treatment, especially in view of the more recent decision of the Supreme Court in *Goldberg* vs. *Kelly,* 397 U.S. 250 (1970), which tends to elevate entitlement to welfare to the status of a property right and to surround it with all the safeguards required by due process. Such benefits, the Court states (page 262), are a matter of 'statutory entitlement for persons qualified to receive them,' and as support for this conclusion, the Court, in footnote 8 of the same page, refers to an article in the Yale Law Review stating that,
>
> > 'It may be realistic today to regard welfare entitlement as more like 'property' than a 'gratuity'.
>
> Therefore, since the Court in *Goldberg* appears to have determined that entitlement to welfare is in the nature of a property right, protected by the Due Process Clause of the Fifth Amendment, by the same rationale it must be deter-

mined that one who has made direct contribution to the Social Security fund and becomes entitled to disability benefits thereunder should and ought to be accorded equal status and protection. For it seems to us to be patently unfair for the welfare recipient under *Goldberg* to have 'property right status' with all the procedural safeguards of due process, while the Social Security recipient, under *Nestor,* is deprived of such status and protection. The distinction is not only completely illogical, but is grossly inequitable. Indeed, it appears to run counter to the intent of Congress as reflected by the comments by Senator George, Chairman of the Senate Finance Committee, at the time of the passage of the Social Security Act concerning its purpose and character, as quoted in the *Nestor* dissent, page 623:

> 'It comports better than any substitute we have discovered with the American concept that free men want to *earn* their security and not ask for doles - that what is due as a matter of *earned right* is far better than a gratuity . . . (Emphasis added).
>
> '*Social Security is not a handout; it is not charity; it is not relief.* It is an *earned right* based upon the contributions and earnings of the individual. As an *earned right,* the individual is eligible to receive his benefit in dignity and self-respect.' (Emphasis added) 102 Cong. Rec. 15110.'

Thus, we must conclude that the concept espoused by the majority in *Nestor,* that one who has contributed to the Social Security fund and later becomes eligible to receive the benefits provided by the Social Security Act has no indefeasible property right to such benefits, is no longer to be considered a viable and

controlling precedent for that principle, in view of the more recent holding in *Goldberg* that a welfare recipient who has made no direct contribution to the fund from which he draws benefits does have a recognizable property right to such benefits and one which is protected by all the safeguards of due process." (Appendix 11-12).

It is submitted that Section 224 of the Social Security Act is contrary to the very purpose of the Social Security Act and bears no rational relation to its purpose, and that Section 224 of said Act operates to the detriment of persons who are to be benefited by the Social Security Act, and thus subverts the very objective that it is intended to serve, violates due process, and this appears to be abundantly clear from a close reading of the dissent in the *Flemming* vs. *Nestor* case. The Fifth Amendment to the Constitution of the United States of America provided in pertinent part that "no person shall . . . be deprived of life, liberty, or property without due process of law . . .".

It, therefore, would seem abundantly clear that if a welfare recipient who has met statutory entitlement is protected by the due process clause of the Fifth Amendment, then surely the Social Security recipient should and must be afforded the same protection, especially in view of the fact that theoretically he has contributed 50% of the trust fund set up by the Social Security Act.

**II. THE REDUCTION IN SOCIAL SECURITY BENEFITS REQUIRED BY SECTION 224 OF THE SOCIAL SECURITY ACT DEPRIVES APPELLEE OF EQUAL PROTECTION UNDER THE LAW.**

The appellee contends that the offset provisions of Section 224 creates arbitrary discrimination between two classes of disabled workers, essentially indistinguishable from each other, except that one is composed of those disabled persons who also receive Workmen's

Compensation benefits, and the other is composed of those disabled persons who also receive benefits from private disability insurance plans or tort claim awards; and that on the basis of this difference alone, the first class has benefits reduced, while the second class has benefits left untouched. The appellee further argues that the offset provisions also discriminates between those persons who were disabled prior to June 1, 1965 and those who became disabled after June 1, 1965.

Section 224 of the Social Security Act provides where an individual under age sixty-two is entitled to disability Social Security benefits and is also entitled to benefits under a Workmen's Compensation law or plan of the United States or a State to periodic benefits for a total or partial disability, whether or not permanent, then such disability recipient shall have his benefits reduced by the formula set forth in Section 224. Section 224 of the Social Security Act does not include any other plan other than a Workmen's Compensation law or plan of the United States or of a State, thus restricting its application to a segment of disabled persons that might be receiving benefits under a Workmen's Compensation plan, either of State or Federal in nature. The appellee contends that the Act discriminates against him and does not provide equal protection to him, in that other disabled persons in the same class may be drawing the same benefits from a private insurance source or from a tort claim award, and yet the law could not apply to him in reducing his Social Security benefits commensurate with your appellee. The appellant argues that the purpose of Section 224 of the Social Security Act was to avoid duplication of public benefits. The appellee would have no argument with the appellant's statement if the benefits he was receiving from the West Virginia Workmen's Compensation Fund was a public benefit. The West Virginia Compensation Act, Chapter 23, Article 2, Section 1 (infra this brief, Appendix, P. 14-24), makes it abundantly clear that no public funds are involved, as the premiums paid into the fund are paid by

the employer and are part of the contract of employment of the appellee. *Goding* vs. *Ott,* 77 W.Va. 487, 87 S.E. 862; *Landcaster* vs. *State Compensation Commissioner,* 125 W.Va. 190, 23 S.E. 2d 601; *Harden* vs. *Workmen's Compensation Appeal Board,* 118 W.Va. 198, 189 S.E. 670.

The District Court, in answer to the appellant's justification of these discriminatory features of the offset provisions of Section 224 of the Social Security Act was to avoid duplication of public benefits, stated:

> "If this be its true purpose, it is certainly a laudable one, and one with which this Court could wholeheartedly accept; however, the argument is inapplicable here, for, as previously shown, Workmen's Compensation in West Virginia is not a gift from the public largesse, but rather is an entitlement arising from a contractual relationship between employer and employee, sanctioned by law, whereby each gave up a legal right in return for a concomitant legal benefit. That no public funds are involved is made abundantly clear by the provisions of West Virginia Code, 23-3-1. And, it is provided that the Workmen's Compensation Fund shall be supported by 'premiums and other funds paid thereto by employers', from which shall be paid all benefits due the employees or their dependents and the expenses of administering the law. No public funds being thus involved, the defendant's (appellant added) argument that plaintiff's Workmen's Compensation award should be treated as a public benefit obviously becomes quite untenable and must be rejeceted".

Although the Fifth Amendment to the Constitution of the United States of America does not specifically contain an equal protection clause, it does provide a restraining and protecting effect on Federal government

action which forbids discrimination that is so unjustifiable as to violative of due process. *Boling* vs. *Sharp,* 347 U.S. 497, 74 Sup. Ct. 693; *Schneider* vs. *Rusk,* 377 U.S. 163. And this same limitation is placed upon the States by the Fourteenth Amendment to the Constitution of the United States of America, which bars any State from similarly depriving a person of his property without due process of law, or acts to discriminatory as to amount to violation of due process of law.

## CONCLUSION

For the reasons stated, the judgment of the District Court should be affirmed and the application of Section 224 of the Social Security Act cannot be applied, since to do so would deprive the appellee of his property without due process of law and deprive the appellee of equal protection under the law as contained in the Fifth and Fourteenth Amendments of the Constitution of the United States of America.

Respectfully submitted,

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## APPENDIX

W. Va. Code, Chapter 23, Article 2, provides:

**Section 1. Employers and Employees, including State, Its Agencies and Political Subdivisions Subject to Chapter.**—The state of West Virginia and all governmental agencies or departments created by it, including county boards of education, are hereby required to subscribe to, and pay premiums into, the workmen's compensation fund for the protection of their employees, and shall be subject to all requirements of this chapter, and all rules and regulations prescribed by the commissioner with reference to rates, classification and premium payments.

All persons, firms, associations and corporations regularly employing other persons for the purpose of carrying on any form of industry, service or business in this state, including county courts, municipalities, other political subdivisions of the state, and civil defense organizations organized under article five, chapter fifteen of this code, are employers within the meaning of this chapter and subject to its provisions: Provided, That the provisions of section eight, article two of this chapter shall not apply to such county courts, municipalities, other political subdivisions of the state, or civil defense organizations organized as aforesaid: Provided, however, That the failure of such county courts, municipalities, other political subdivisions of the state, or civil defense organizations organized as aforesaid, to elect to subscribe to, and to pay premiums into, the workmen's compensation fund, shall not impose any liability upon them, or either of them, other than such liability as would exist notwithstanding the provisions of this chapter. All persons in the service of employers as herein defined, and employed by them for the purpose of carrying on the industry, business, service, or work in which they are engaged, including persons regularly employed in the state whose duties necessitate employment of a temporary or transitory nature by the same employer without the state, and

check-weighmen employed according to law, all members of rescue teams assisting in mine accidents with the consent of the owner who, in such case, shall be deemed the employer, or at the direction of the director of the department of mines, and all forest fire fighters who, under the supervision of the director of the department of natural resources or his designated representative, assist in the prevention, confinement and suppression of any forest fire, are employees within the meaning of this chapter and subject to its provisions: Provided further, That this chapter shall not apply to employers of employees in domestic service or persons whose employment is prohibited by law, nor to employees of an employer while employed without the state, except in case of temporary employment without the state as hereinbefore provided; nor shall a member of a firm of employers, or any official of an association or of a corporate employer, including managers, or any elective or appointive official of the state, county, county court, board of education, municipality, other political subdivision of the state, or civil defense organization organized as aforesaid, whose term of office is definitely fixed by law, be deemed an employee within the meaning of this chapter: And provided further, That employers of not more than three employees for a period of not more than one month, who shall be called herein "casual employers", employers of employees in agricultural service and duly incorporated volunteer fire departments or companies may voluntarily elect to subscribe to, and pay premiums into, the workmen's compensation fund for the protection of the employees of such employers and all of the members, including the chief, commander or other officials thereof, of such duly incorporated volunteer fire departments or companies, and in such case shall be subject to all requirements of this chapter and all rules and regulations prescribed by the commissioner with reference to rates, classifications and premium payments, but such casual employers, employers of employees in agricultural service and duly incorporated volunteer fire departments or companies shall not be required to subscribe to the workmen's com-

pensation fund and their failure to subscribe to such fund shall not impose any liability upon them other than such liability as would exist notwithstanding the provisions of this chapter; nor shall the provisions of section eight of this article apply to casual employers, employers of employees in agricultural service or to such duly incorporated volunteer fire departments or companies.

The premium and actual expenses in connection with governmental agencies and departments of the state of West Virginia shall be paid out of the state treasury from appropriations made for such agencies and departments, in the same manner as other disbursements are made by such agencies and departments.

County courts, municipalities, other political subdivisions of the state, county boards of education, civil defense organizations organized as aforesaid, any duly incorporated volunteer fire departments or companies which shall elect to become subscribers to the workmen's compensation fund shall provide for the funds to pay their prescribed premiums into the fund, and such premiums, and premiums of state agencies and departments, including county boards of education, shall be paid into the fund in the same manner as herein provided for other employers subject to this chapter. In addition to its usual and ordinary meaning, the term "Employer" or "employers", as used in this chapter, shall be taken to extend to and include any duly incorporated volunteer fire department or company, or civil defense organization organized as aforesaid, which shall elect to subscribe to, and pay premiums into, the workmen's compensation fund, and in addition to its usual and ordinary meaning, the term "Employee" or "Employees", as used in this chapter, shall be taken to extend to and include all of the members of any such department, company or organization. All duly incorporated volunteer fire departments or companies, and civil defense organizations organized as aforesaid, which shall elect to subscribe to, and pay premiums into, such fund, shall be placed in a separate group or class of subscribers

to be established by the commissioner, and such departments, companies or organizations shall pay into the fund such premiums (computed, notwithstanding the provisions of section five of this article on such basis as to the commissioner shall seem right and proper) as may be necessary to keep such group or class entirely self-supporting.

Any employer whose employment in this state is to be for a definite or limited period, which could not be considered "regularly employing" within the meaning of this section, may elect to pay into the workmen's compensation fund the premiums herein provided for, and at the time of making application to the commissioner such employer shall furnish a statement under oath showing the probable length of time the employment will continue in this state, the character of the work, an estimate of the monthly payroll, and any other information which may be required by the commissioner. At the time of making application such employer shall deposit with the state compensation commissioner to the credit of the workmen's compensation fund the amount required by section five of this article, which amount shall be returned to such employer, if his application be rejected by the commissioner. Upon notice to such employer of the acceptance of his application by the commissioner, he shall be an employer within the meaning of this chapter and subject to all of its provisions.

Any foreign corporation employer electing to comply with the provisions of this chapter and to receive the benefits hereunder, shall, at the time of making application to the commissioner, in addition to other requirements of this chapter, furnish such commissioner with certificate from the secretary of state showing that it has complied with all the requirements necessary to enable it legally to do business in this state, and no application of such foreign corporation employer shall be accepted by the commissioner until such certificate is filed.

For the purpose of this chapter, a mine shall be adjudged within this state when the main opening, drift, shaft or slope is located wholly within this state.

Any employee within the meaning of this chapter whose employment necessitates his temporary absence from this state in connection with such employment, and such absence is directly incidental to carrying on an industry in this state, who shall have received injury during such absence in the course of and resulting from his employment, shall not be denied the right to participate in the workmen's compensation fund.

**Sec. 6. Exemption of Contributing Employers from liability.** — Any employer subject to this chapter who shall elect to pay into the workmen's compensation fund the premiums provided by this chapter shall not be liable to respond in damages at common law or by statute for the injury or death of any employee, however occurring, after such election and during any period in which such employer shall not be in default in the payment of such premiums and shall have complied fully with all other provisions of this chapter: Provided, That the injured employee has remained in his service with notice that his employer has elected to pay into the workmen's compensation fund the premiums provided by this chapter. The continuation in the service of such employer with such notice shall be deemed a waiver by the employee and by the parents of any minor employee of the right of action as aforesaid, which the employee or his or her parents would otherwise have.

**Sec. 6-a. Exemption from Liability of Officers, Managers, Agents, Representatives or Employees of Contributing Employers.**—The immunity from liability set out in the preceding section shall extend to every officer, manager, agent, representative or employee of such employer when he is acting in furtherance of the employer's business and does not inflict an injury with deliberate intention.

**Sec. 7. Notice to Employees; Waiver of Benefits of Chapter by Contract Prohibited.**—Each employer electing to pay the premiums provided by this chapter into the workmen's compensation fund, or electing to make direct payments of compensation as hereinafter provided, shall post and keep posted in conspicuous places about his place or places of business typewritten or printed notices stating the fact that he has made such election, and the same when so posted shall constitute sufficient notice to all his employees and to parents of any minor employees of the fact that he has made such election. No employer or employee shall exempt himself from the burden or waive the benefits of this chapter by any contract, agreement, rule, or regulation, and any such contract, agreement, rule or regulation shall be pro tanto void.

**Sec. 8. Election Not to Pay or Default in Payment of Premiums; Defenses Prohibited.**—All employers subject to this chapter, except the state of West Virginia and the governmental agencies or departments created by it, who shall not have elected to pay into the workmen's compensation fund the premiums provided by this chapter and have not elected to pay individually and directly or from benefit funds compensation and expenses to injured employees or fatally injured employees' dependents under the provisions of section nine of this article, or having so elected shall be in default in the payment of the same, or not having otherwise fully complied with the provisions of section five or section nine of this article, shall be liable to their employees (within the meaning of this article) for all demages suffered by reason of personal injuries sustained in the course of employment caused by the wrongful act, neglect or default of the employer or any of the employer's officers, agents or employees while acting within the scope of their employment and in the course of their employment and also to the personal representative of such employees where death results from such personal injuries, and in any action by any such employee or personal representative thereof, such defendant shall not avail himself of the following common

law defenses: The defense of the fellow - servant rule; the defense of the assumption of risk; or the defense of contributory negligence; and further shall not avail himself of any defense that the negligence in question was that of some one whose duties are prescribed by statute: Provided, however, That such provision depriving a defendant employer of certain common law defenses under the circumstances therein set forth shall not apply to an action brought against a county court, board of education, municipality, or other political subdivision of the state or against a casual employer or an employer of employees in agricultural service.

**Sec. 9. Election of Employer to Provide Own System of Compensation.**—Notwithstanding anything contained in this chapter, employers subject to this chapter who are of sufficient financial responsibility to insure the payment of compensation to injured employees and the dependents of fatally injured employees, whether in the form of pecuniary compensation or medical attention, funeral expenses or otherwise as herein provided of the value at least equal to the compensation provided in this chapter, or employers of such financial responsibility who maintain their own benefit funds, or system of compensation, to which their employees are not required or permitted to contribute, or such employers as shall furnish bond or other security to insure such payments, may, upon a finding of such facts by the compensation commissioner, elect to pay individually and directly, or from such benefit funds, department or association, such compensation and expenses to injured employees or fatally injured employees' dependents. The compensation commissioner shall require security or bond from such employer, to be approved by him, and of such amount as is by him considered adequate and sufficient to compel or secure to such employees, or their dependents, payment of the compensation and expenses herein provided for, which shall in no event be less than the compensation paid or furnished out of the state workmen's compensation fund in similar cases to injured employees or the dependents of fatally

injured employees whose employers contribute to such fund. Any employer electing under this section shall on or before the twentieth day of the first month of each quarter, for the preceding quarter, file with the commissioner a sworn statement of the total earnings of all his employees subject to this chapter for such preceding quarter, and shall pay into the workmen's compensation fund a sum sufficient to pay his proper proportion of the expenses of the administration of his chapter, as may be determined by the commissioner. The commissioner shall make and publish rules and regulations governing the mode and manner of making application, and the nature and extent of the proof required to justify the finding of facts by the commissioner, to consider and pass upon such election by employers subject to this chapter, which rules and regulations shall be general in their application. Any employer subject to this chapter who shall elect to carry his own risk and who has complied with the requirements of this section and the rules of the compensation commissioner shall not be liable to respond in damages at common law or by statute for the injury or death of any employee, however, occurring, after such election and during the period that he is allowed by the commissioner to carry his own risk; provided the injured employee has remained in his service with notice given, as provided for in section seven of this article, that his employer has elected to carry his own risk as herein provided. The continuation in the service of such employer with such notice shall be deemed a waiver by the employee and by the parents of any minor employee of the right of action, as aforesaid, which the employee or his or her parents would otherwise have.

Any employer whose record upon the books of the compensation commissioner shows, a liability against the workmen's compensation fund incurred on account of injury to or death of any of his employees, in excess of premiums paid by such employer, shall not be granted the right, individually and directly or from such benefit funds, department or association, to compensate his injured employees and the dependents of his fatally injured

employees until he has paid into the workmen's compensation fund the amount of such excess of liability over premiums paid, including his proper proportion of the liability incurred on account of explosions, catastrophes or second injuries as defined in section one, article three of this chapter; occurring within the state and charged against such fund.

All employers who have heretofore elected, or shall hereafter elect, to pay compensation and expenses directly as provided in this section, shall, unless they give the catastrophe and second injury security or bond hereinafter provided for, pay into the surplus fund referred to in section one, article three of this chapter upon the same basis and in the same percentages, subject to the limitations herein set forth, as funds are set aside for the maintenance of the surplus fund out of payments made by premium-paying subscribers, such payments to be made at the same time as hereinbefore provided with respect to payment of proportion of expenses of administration. In case there be a catastrophe or second injury, as defined in section one, article three of this chapter, to the employees of any employer making such payments, the employer shall not be liable to pay compensation or expenses arising from or necessitated by the catastrophe or second injury, and such compensation and expenses shall not be charged against such employer, but such compensation and expenses shall be paid from the surplus fund in the same manner and to the same extent as in the case of premium-paying subscribers.

If an employer elects to make payments into the surplus fund as aforesaid, then the bond or other security required by this section shall be of such amount as the commissioner considers adequate and sufficient to compel or secure to the employees or their dependents payment of compensation and expenses, except any compensation and expenses that may arise from, or be necessitated by, any catastrophe or second injury, as defined in section one, article three of this chapter, which last are secured

by and shall be paid from the surplus fund as hereinbefore provided.

If any employer elect not to make payments into the surplus fund, as hereinbefore provided, then, in addition to bond or security in the amount hereinbefore set forth, such employer shall furnish catastrophe and second injury security or bond, approved by the commissioner, in such additional amount as the commissioner shall consider adequate and sufficient to compel or secure payment of all compensation and expenses arising from, or necessitated by, any catastrophe or second injury that might thereafter ensue.

All employers hereafter making application to carry their own risk under the provisions of this section, shall with such application, make a written statement as to whether such employer elects to make payments aforesaid into the surplus fund, or not to make such payments and to give catastrophe and second injury security or bond hereinbefore in such case provided for.

All employers who have heretofore elected to carry their own risk under the provisions of this section shall be deemed to have elected to make payments into the surplus fund unless, within thirty days after the effective date of this act, they notify the commissioner in writing to the contrary: Provided, however, That such employers, as have heretofore elected, under the rules heretofore promulgated by the commissioner, not to make payments into the surplus fund, shall be deemed to have elected to give the catastrophe and second injury security or bond hereinbefore provided for and not to make payments into the surplus fund. Any catastrophe and second injury security or bond heretofore gives under rules and regulations promulgated by the commissioner and approved by him shall be valid under this section, and any election heretofore made under the rules and regulations of the commissioner to make payments into the surplus fund shall be valid and protective to the person so electing

from and after the date of such election.

In any case under the provisions of this section that shall require the payment of compensation or benefits by an employer in periodical payments, and the nature of the case makes it possible to compute the present value of all future payments, the commissioner may in his discretion, at any time compute and permit or require to be paid into the workmen's compensation fund an amount equal to the present value of all unpaid compensation for which liability exists, in trust; and thereupon such employer shall be discharged from any further liability upon such award, and payment of the same shall be assumed by the Workmen's Compensation Fund.

No. 1091

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1970

ELLIOT L. RICHARDSON, Secretary of Health, Education and Welfare,

Appellant

vs.

RAYMOND BELCHER,

Appellee

On Appeal from the United States District Court for the Southern District of West Virginia

# BRIEF OF THE AMERICAN TRIAL LAWYERS ASSOCIATION AS AMICUS CURIAE

## INTEREST OF THE AMERICAN TRIAL LAWYERS ASSOCIATION

This brief *amicus curiae* is filed by the American Trial Lawyers Association.

The American Trial Lawyers Association ("ATL") is a national association composed of lawyers regularly engaged in the trial and appeal of all types of contested matters (including workmen's compensation cases and social security claims), sitting judges, law professors, lawyer-administrators, and other lawyers, whose membership now numbers over 25,000. This association through its appropriate officers and committees, has authorized its participation in this cause as amicus curiae.

One of the principal functions of ATL and its members is to establish and protect the rights of individuals who have suffered injuries to their persons. The decision of the Court in this cause will have far-reaching effects, not only upon the rights of injured workmen, but also upon the rights of other injured persons whose right to recover compensation for such injuries may be limited by statute. ATL has a strong interest in insuring that such limitations, where necessary and proper, are not arbitrary or discriminatory.

## SUMMARY OF ARGUMENT

It is the position of ATL that in the instant case, the District Court correctly held that the reduction of plaintiff's social security disability benefits was unconstitutional as being in violation of the Due Process Clause of the Fifth Amendment of the U.S. Constitution, since the statute (Section 224 of the Social Security Act) authorizes such reduction only in the case of a narrow, limited class of persons, namely, those who are simultaneously receiving social security disability benefits and disability payments pursuant to a workmen's compensation award, and such classification is patently arbitrary and lacks any rational justification.

## ARGUMENT

The factual background and statutory basis for this litigation are fully discussed in the other briefs and need not be reiterated here. The issue in this case is a simple one: Is § 224 of the Social Security Act (42 U.S.C. § 424a) together with the relevant Department of Health, Education and Welfare regulations promulgated thereunder, invalid by reason of being in conflict with the Fifth Amendment to the United States Constitution?

There can be no question but that the plaintiff in this case is a member of a limited class of persons whose social security disability benefits are subject to reduction. The statute singles out one and only one collateral source of disability compensation to be credited in whole or in part against social security payments – workmen's compensation awards. Only those persons whose disability happens to have arisen from a work-connected injury, who have brought a claim for workmen's compensation against their employer, who have satisfied the notice provisions, limitations, burden of proof, and all other substantive and procedural requirements of the particular state's workmen's compensation law, and finally have received a valid workmen's compensation award, are subject to having their social security disability benefits reduced or terminated.

There are numerous other classes of persons receiving disability compensation payments whose social security benefits are not subject to reduction. These include:

1. **Employees who suffer work-connected injuries but do not make a workmen's compensation claim.** With respect to certain employees, particularly at the management level, the employer may have a policy of

continuing to pay the employee's salary during periods of sickness or injury, or for a specified period of time in the event of total and permanent disability. In such cases, the employee may elect to forego his potential workmen's compensation claim and accept in lieu thereof more favorable wage continuation payments. Such payments do not cause a reduction in social security benefits. Or the employee may threaten to bring a workmen's compensation claim, as a result of which the employer may settle with the employee by agreeing to some sort of wage continuation plan. This is particularly likely where the employer is a self-insurer with respect to workmen's compensation. See, *e.g.*, W. Va. Code Ann. 23-2-9 (1970). Again, such payments do not cause a reduction in social security benefits.

2. **Employees who suffer work-connected injuries while employed by an employer not covered by workmen's compensation.** In many states, including West Virginia, some or all employers may elect not to come under the provisions of the workmen's compensation act.[1] As to the employers who so elect, their employees' injuries may be compensated by some form of private wage continuation plan, employer-funded disability income insurance, or the proceeds of a tort action against the employer. In such cases, any benefit received by the injured employee does not cause a reduction in his social security benefits.

3. **Self-employed persons who suffer work-connected injuries.** Persons who are self-employed commonly purchase disability income insurance, since they are not covered by workmen's compensation. Payments received from such insurance do not cause a reduction in social security benefits, even where the injury is work-related.

4. **Persons whose disability did not arise during the course and scope of their employment.** Many employers have wage continuation plans - - formal and informal - - for disabled employees which are provided even where the disability did not arise out of the employment. Payments under such plans,

1. Twenty-three states, including West Virginia, permit employers to elect not to come within the workmen's compensation system. 3 Larson, Law of Workmen's Compensation 522, Appendix A, Table 7 (1971); W. Va. Code Ann., § 23-2-1, 23-2-8 (1970).

whether employer- or insurance-funded, do not reduce social security benefits. Further, many persons voluntarily purchase disability income insurance to provide for the situation where the disability does not arise out of their employment. While such insurance commonly is limited by its terms to 80% or 100% of the employee's highest wages, there is typically no offset for social security disability benefits, and payments received pursuant to such an insurance contract do not reduce the individual's social security benefits.

5. **Persons whose disability arises from injuries caused by a third party.** Many persons are rendered disabled by the negligence of some one other than his employer or co-employees. In any judgment or settlement received by the person disabled as a result of a tort claim against the third-party tortfeasor, one of the elements of damages is lost wages, past and future. Such damages are not subject to reduction by reason of collateral benefits[2] such as social security, and under the Social Security Act, the judgment or settlement does not cause a reduction in social security benefits.

In all of the foregoing situations, (and undoubtedly other examples could be found), an individual receives some form of wage continuation or disability income *in addition* to social security disability payments and which do not cause his social security payments to be diminished. Section 224 of the Social Security Act singles out only one specific type of collateral source benefit -- payments pursuant to a workmen's compensation award -- to serve as an offset against social security benefits. Unquestionably, Section 224 is discriminatory, and on its face such discrimination must be deemed arbitrary and unjustifiable.

The Fifth Amendment to the United States Constitution provides, in part:

> "No person shall . . . be deprived of . . . property, without due process of law; . . . ."

This Court has previously ruled that benefits under the Social Security Act are subject to the provisions of the Due Process Clause, and may not be arbitrarily and unjustifiably withheld. *Flemming v. Nestor,* 363 U.S. 603, 611, 80 Sup. Ct. 1367, 1373 (1960). Although the particular provision of the statute questioned in that case was held *not* to violate the Due Process Clause, this Court stated:

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2. Except that in most states, whoever pays the workmen's compensation award is entitled to be reimbursed out of any tort judgment or settlement recovered from a third party. See 2 Larson, Law of Workmen's Compensation 74.31, pp. 226.105-226.118 (1970).

> "This is not to say, however, that Congress may exercise its power to modify the statutory scheme free of all constitutional restraint. The interest of a covered employee under the Act is of sufficient substance to fall within the protection from arbitrary governmental action afforded by the Due Process Clause . . . . Particularly when we deal with a withholding of a noncontractual benefit under a social welfare program such as this, we must recognize that the Due Process Clause can be thought to interpose a bar only if the statute manifests a patently arbitrary classification, utterly lacking in rational justification."

See also *Shapiro v. Thompson*, 394 U.S. 618, 641-42, 89 Sup. Ct. 1322, 1335 (1969) (District of Columbia welfare benefits withheld in violation of Due Process Clause); *Schneider v. Rusk*, 377 U.S. 163, 168, 84 Sup. Ct 1187, 1190 (1964) (Fifth Amendment prohibits unjustifiable and arbitrary discrimination in act of Congress); *Bolling v. Sharpe*, 347 U.S. 497, 499, 74 Sup. Ct. 693, 694 (1954) (same). *Cf. Goldberg v. Kelly*, 397 U.S. 254, 90 Sup. Ct. 1011, 1017 (1970) (welfare benefits as "property").

The question is, then, is there any rational justification for the discrimination which is apparent in Section 224 of the Social Security Act?

Clearly, there is no difference of any substance between the disability income payments in any of the examples noted above and payments pursuant to a workmen's compensation award, either in source or quality. Workmen's compensation is paid for by the employer, either directly or through the purchase of insurance. It is a part of the cost of labor. Similarly, the work-connected disability income payments in most of the examples given above are funded either by the employer or by the employee himself. Presumably, if paid for by the employee (through the purchase of insurance), the cost is reflected in the wages paid to the employee, since the employer who does not provide this fringe benefit must pay extra wages to be competitive. Of the examples given, only payments pursuant to a third-party tort judgment or settlement are not funded by the employer or employee, and there is no basis for a distinction between workmen's compensation awards and such tort judgments or settlements vis-a-vis the reduction of social security benefits.

Furthermore, there is no reason to assume that workmen's compensation awards will be larger than the disability income benefits described in the examples above so as to justify different treatment under the Social Security Act. In fact, if anything, payments in the examples given above are apt to be larger than workmen's compensation benefits, since they are not subject to the limitation of a statutory payment schedule as in the case of workmen's compensation.

The Government in this case has not suggested any plausible rationale for the discrimination contained in Section 224. Indeed, there is only one conceivable reason for singling out workmen's compensation awards to offset social security payments - - administrative convenience of enforcement. Workmen's compensation awards are ordinarily matters of public record. The Social Security Administration can obtain from the states or court records information as to the identity of those receiving workmen's compensation and the amount of their award. Other forms of disability income payments, including most of those listed in the examples given above, are not matters of public record or would not be so easily discovered.

But administrative convenience is not a proper rationale for a statutory provision which discriminates against a narrow class of beneficiaries and favors all other classes similarly situated. Congress has said that social security disability benefits shall be *primary* as to all classes of persons *except* those who also happen to qualify for and receive workmen's compensation awards, and as to them and them alone social security shall be *secondary*, much like so-called "other insurance." This it cannot constitutionally do.

We do not suggest that Congress could not validly reduce social security payments *pro tanto* to the extent of benefits received from other sources. But in order to be valid, such reduction should encompass substantially *all forms of disability income*, regardless of the particular statute, plan or contract by which such income is paid.

Moreover, a statute providing for *all* forms of disability income to reduce social security benefits would present no unique problems of administrative enforcement. For example, an application for social security disability benefits could simply require the applicant to disclose all other sources of disability income, much as our tax laws now require voluntary disclosure of all taxable income. This disclosure requirement could be made a continuing one. Penalties could be provided for failure to make such disclosure, including forfeiture of social security benefits. In any event, the Government cannot justify such clear discrimination on the ground that a broader offset provision would be more difficult to enforce. Indeed, its briefs do not attempt to do so.

It is suggested in the briefs that one justification for Section 224 is that its purpose is to encourage rehabilitation and to discourage malingering. If that is true, and assuming that it will in fact have that effect, then as we

have previously shown it does not go far enough. There is no basis for assuming that those receiving workmen's compensation are more likely to malinger, or less likely to seek rehabilitation, than persons receiving disability income from any other source. In fact, the opposite may be true, since many workmen's compensation systems and insurers have rehabilitation programs which are not available to persons receiving disability income from other sources. See, *e.g.*, W. Va. Code Ann. 23-4-9 (1970). In any event, if the policy of the statute is to encourage rehabilitation, there remains no justification for applying that policy only to a narrow class of disabled persons.

The Government also suggests that a possible purpose and effect of Section 224 is to protect state workmen's compensation systems, since if social security disability benefits are primary, states may amend their workmen's compensation acts to shift the burden of a disabled worker's compensation to the social security system. Upon examination, however, this rationale also fails. In the first place, the states could do that under the present act if they wished to do so. There is nothing to prevent a state from making its workmen's compensation benefits begin where social security leaves off, making the maximum total disability benefit equal to the eighty percent limitation of Section 224. Thus, Section 224 does nothing to effectuate any such policy. In the second place, payments for total and permanent disability are only a small part of the total scheme of compensation of any workmen's compensation act. Benefits are also provided for medical and hospital expenses, funeral expenses, rehabilitation, specific scheduled losses, temporary total disability, permanent partial disability, and other forms of loss,[3] all of which are unaffected by social security. Obviously, predictions of the demise of the state workmen's compensation systems in the absence of Section 224 are grossly exaggerated.

Finally, it is argued that a purpose of Section 224 is to prevent double payments for the same loss. If by this is meant double payments from public funds, the premise fails. Workmen's compensation is funded either by private insurance or by payments by the employer to a state agency, which acts merely as a depositary or conduit. Social security itself is financed primarily through payments from participating employers and employees. Public funds are not involved. Moreover, as we have previously shown, Section 224 acts only upon one narrow class of persons receiving

3. See, *e.g.*, W. Va. Code Ann., 23-4-3, 23-4-4, 23-4-6 (1970).

disability income from a collateral source. Social security may duplicate disability income received from any other source. There is no justification for a policy which limits its effect to this one particular group.

The conclusion is inescapable that there is no valid basis for Section 224. Clearly, the statute "manifests a patently arbitrary classification, utterly lacking in rational justification." *Flemming v. Nestor*, 363 U.S. 603, 611, 80 Sup. Ct. 1367, 1373 (1960). As such, it is in violation of the Due Process Clause and unconstitutional.

## CONCLUSION

For the foregoing reasons, the American Trial Lawyers Association respectfully urges that the judgment of the United States District Court for the Southern District of West Virginia be affirmed.

Respectfully submitted,

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# RICHARDSON, SECRETARY OF HEALTH, EDUCATION, AND WELFARE *v.* BELCHER

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

No. 70–53. Argued October 13, 1971—Decided November 22, 1971

Section 224 of the Social Security Act, which requires a reduction in social security benefits to reflect workmen's compensation payments, has a rational basis and does not violate the Due Process Clause of the Fifth Amendment.

317 F. Supp. 1294, reversed.

STEWART, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE and BLACKMUN, JJ., joined. DOUGLAS, J., filed a dissenting opinion, *post*, p. 84. MARSHALL, J., filed a dissenting opinion, in which BRENNAN, J., joined, *post*, p. 88.

*Richard B. Stone* argued the cause for appellant. With him on the brief were *Solicitor General Griswold, Assistant Attorney General Gray,* and *Kathryn H. Baldwin.*

*John Charles Harris* argued the cause and filed a brief for appellee.

*William E. Miller* and *Richard A. Whiting* filed a brief for the American Mutual Insurance Alliance et al. as *amici curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed by *Edward J. Kionka* for the American Trial Lawyers Association, and by *Edward L. Carey, Harrison Combs,* and *M. E. Boiarsky* for United Mine Workers of America.

MR. JUSTICE STEWART delivered the opinion of the Court.

The appellee was granted social security disability benefits effective in October 1968, in the amount of $329.70 per month for himself and his family. In January 1969, the federal payment was reduced to $225.30

monthly under the "offset" provision of Section 224 of the Social Security Act, 79 Stat. 406, 42 U. S. C. § 424a,[1] upon a finding that the appellee was receiving workmen's compensation benefits from the State of West Virginia in the amount of $203.60 per month. After exhausting his administrative remedies, the appellee brought this action challenging the reduction of payments required by § 224 on the ground that the statutory provision deprived him of the due process of law guaranteed

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[1] Section 224 provides, in pertinent part:

"(a) If for any month prior to the month in which an individual attains the age of 62—

"(1) such individual is entitled to benefits under section 423 of this title, and

"(2) such individual is entitled for such month, under a workmen's compensation law or plan of the United States or a State, to periodic benefits for a total or partial disability (whether or not permanent), and the Secretary has, in a prior month, received notice of such entitlement for such month,

"the total of his benefits under section 423 of this title for such month and of any benefits under section 402 of this title for such month based on his wages and self-employment income shall be reduced (but not below zero) by the amount by which the sum of—

"(3) such total of benefits under sections 423 and 402 of this title for such month, and

"(4) such periodic benefits payable (and actually paid) for such month to such individual under the workmen's compensation law or plan,

"exceeds the higher of—

"(5) 80 percentum of his 'average current earnings.' . . .

"For purposes of clause (5), an individual's average current earnings means the larger of (A) the average monthly wage used for purposes of computing his benefits under section 423 of this title, or (B) one-sixtieth of the total of his wages and self-employment income (computed without regard to the limitations specified in sections 409 (a) and 411 (b)(1) of this title) for the five consecutive calendar years after 1950 for which such wages and self-employment income were highest. . . ." 42 U. S. C. § 424a (a).

by the Fifth Amendment. The District Judge, disagreeing with other courts that have considered the question,[2] held the statute unconstitutional. 317 F. Supp. 1294. The Secretary of the Department of Health, Education, and Welfare appealed directly to this Court under 28 U. S. C. § 1252.[3] We noted probable jurisdiction, 401 U. S. 935, and the case was briefed and argued on the merits. We now reverse the judgment of the District Court.

In our last consideration of a challenge to the constitutionality of a classification created under the Social Security Act, we held that "a person covered by the Act has not such a right in benefit payments as would make every defeasance of 'accrued' interests violative of the Due Process Clause of the Fifth Amendment." *Flemming* v. *Nestor*, 363 U. S. 603, 611. The fact that social security benefits are financed in part by taxes on an employee's wages does not in itself limit the power of Congress to fix the levels of benefits under the Act or the conditions upon which they may be paid. Nor does an expectation interest in public benefits confer a contractual right to receive the expected amounts. Our decision in *Goldberg* v. *Kelly*, 397 U. S. 254, upon which

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[2] *E. g.*, *Gambill* v. *Finch*, 309 F. Supp. 1 (ED Tenn. 1970); *Lofty* v. *Cohen*, 325 F. Supp. 285, aff'd *sub nom. Lofty* v. *Richardson*, 440 F. 2d 1144 (CA6 1971); *Bartley* v. *Finch*, 311 F. Supp. 876 (ED Ky. 1970); *Bailey* v. *Finch*, 312 F. Supp. 918 (ND Miss. 1970); *Benjamin* v. *Finch*, Civ. No. 32816, ED Mich., May 26, 1970, aff'd *sub nom. Benjamin* v. *Richardson*, No. 20,714, CA6, Apr. 29, 1971; *Gooch* v. *Finch*, Civ. No. 6840, SD Ohio, July 13, 1970; *Rodatz* v. *Finch*, Civ. No. 69–170, ED Ill., Sept. 4, 1970, aff'd *sub nom. Rodatz* v. *Richardson*, — F. 2d — (CA7 1971).

[3] "Any party may appeal to the Supreme Court from an interlocutory or final judgment, decree or order of any court of the United States . . . , holding an Act of Congress unconstitutional in any civil action, suit, or proceeding to which the United States or any of its agencies, or any officer or employee thereof, as such officer or employee, is a party."

the District Court relied, held that as a matter of procedural due process the interest of a welfare recipient in the continued payment of benefits is sufficiently fundamental to prohibit the termination of those benefits without a prior evidentiary hearing. But there is no controversy over procedure in the present case, and the analogy drawn in *Goldberg* between social welfare and "property," 397 U. S., at 262 n. 8, cannot be stretched to impose a constitutional limitation on the power of Congress to make substantive changes in the law of entitlement to public benefits.

To characterize an Act of Congress as conferring a "public benefit" does not, of course, immunize it from scrutiny under the Fifth Amendment. We have held that "[t]he interest of a covered employee under the [Social Security] Act is of sufficient substance to fall within the protection from arbitrary governmental action afforded by the Due Process Clause." *Flemming* v. *Nestor, supra,* at 611. The appellee argues that the classification embodied in § 224 is arbitrary because it discriminates between those disabled employees who receive workmen's compensation and those who receive compensation from private insurance or from tort claim awards. We cannot say that this difference in treatment is constitutionally invalid.

A statutory classification in the area of social welfare is consistent with the Equal Protection Clause of the Fourteenth Amendment if it is "rationally based and free from invidious discrimination." *Dandridge* v. *Williams,* 397 U. S. 471, 487. While the present case, involving as it does a federal statute, does not directly implicate the Fourteenth Amendment's Equal Protection Clause, a classification that meets the test articulated in *Dandridge* is perforce consistent with the due process requirement of the Fifth Amendment. Cf. *Bolling* v. *Sharpe,* 347 U. S. 497, 499.

To find a rational basis for the classification created by § 224, we need go no further than the reasoning of Congress as reflected in the legislative history. The predecessor of § 224, enacted in 1956 along with the amendments first establishing the federal disability insurance program, required a full offset of state or federal[4] workmen's compensation payments against benefits payable under federal disability insurance: 70 Stat. 816. It is self-evident that the offset reflected a judgment by Congress that the workmen's compensation and disability insurance programs in certain instances served a common purpose, and that the workmen's compensation programs should take precedence in the area of overlap. The provision was repealed in 1958, 72 Stat. 1025, because Congress believed that "the danger that duplication of disability benefits might produce undesirable results [was] not of sufficient importance to justify reduction of the social security disability benefits." H. R. Rep. No. 2288, 85th Cong., 2d Sess., p. 13.

In response to renewed criticism of the overlap between the workmen's compensation and the social security disability insurance programs, Congress re-examined the problem in 1965. Data submitted to the legislative committees showed that in 35 of the 50 States, a typical worker injured in the course of his employment and eligible for both state and federal benefits received compensation for his disability in excess of his take-home pay

[4] The primary federal workmen's compensation programs are the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424, 33 U. S. C. § 901 *et seq.*, applicable to employees in the District of Columbia and in maritime-related occupations, and the Federal Employees' Compensation Act, 80 Stat. 532, 5 U. S. C. § 8101 *et seq.*, applicable to employees of the Federal Government. The overwhelming majority of workers in the United States are covered by state rather than federal programs, and thus we may refer generally to workmen's compensation as a program of the States.

prior to the disability. Hearings on H. R. 6675 before the Senate Committee on Finance, 89th Cong., 1st Sess., pt. 2, p. 904. It was strongly urged that this situation reduced the incentive of the worker to return to the job, and impeded the rehabilitative efforts of the state programs. Furthermore, it was anticipated that a perpetuation of the duplication in benefits might lead to the erosion of the workmen's compensation programs.[5] The legislative response was § 224, which, by limiting total state and federal benefits to 80% of the employee's average earnings prior to the disability, reduced the duplication inherent in the programs and at the same time allowed a supplement to workmen's compensation where the state payments were inadequate.

The District Court apparently assumed that the only basis for the classification established by § 224 lay in the characterization of workmen's compensation as a "public benefit." Because the state program was financed by employer contributions rather than by taxes, the Court held that the "public" characterization afforded no rational basis to distinguish workmen's compensation from private insurance. We agree that a statutory discrimination between two like classes cannot be rationalized by assigning them different labels, but neither can two unlike classes be made indistinguishable by attaching to them a common label. The original purpose of state workmen's compensation laws was to satisfy a need in-

[5] The Senate Committee on Finance, with which the 1965 amendment originated, took note of "the concern that has been expressed by many witnesses in the hearings about the payment of disability benefits concurrently with benefits payable under State workmen's compensation programs." S. Rep. No. 404, 89th Cong., 1st Sess., pt. 1, p. 100. Testimony concerning the anticipated effects of duplication upon the future of the state programs appears in Hearings on H. R. 6675 before the Senate Committee on Finance, 89th Cong., 1st Sess., pt. 1, pp. 252, 259, 366, pt. 2, pp. 540, 738–740, 892–897, 949–954, 990.

adequately met by private insurance or tort claim awards. Congress could rationally conclude that this need should continue to be met primarily by the States, and that a federal program that began to duplicate the efforts of the States might lead to the gradual weakening or atrophy of the state programs.

We have no occasion, within our limited function under the Constitution, to consider whether the legitimate purposes of Congress might have been better served by applying the same offset to recipients of private insurance, or to judge for ourselves whether the apprehensions of Congress were justified by the facts. If the goals sought are legitimate, and the classification adopted is rationally related to the achievement of those goals, then the action of Congress is not so arbitrary as to violate the Due Process Clause of the Fifth Amendment.

The judgment is

*Reversed.*

MR. JUSTICE DOUGLAS, dissenting.

I would affirm the judgment of the District Court. The statutory classification upheld today is not "rationally based and free from invidious discrimination." *Dandridge* v. *Williams*, 397 U. S. 471, 487. It is, in my view, violative of the Federal Government's obligation under the Fifth Amendment's Due Process Clause to guarantee to all citizens equal protection of the laws. *Bolling* v. *Sharpe*, 347 U. S. 497.

Eligibility for social security disability benefits is premised upon a worker's having attained "insured" status in the course of an employment "covered" by the Act. It is undisputed that Raymond Belcher, and through him his wife and two minor children, had so qualified in 1968 when he broke his neck while employed by the Pocahontas Fuel Co. in Lynco, West Virginia. Indeed, his application for such benefits has been approved, and the benefits authorized and paid.

Section 224 of the Social Security Act, however, requires that these benefits be substantially reduced solely because Belcher also receives state workmen's compensation payments. It is said that the duplication of benefits impedes rehabilitation, and may lead to a cutting back of state workmen's compensation programs. *Ante*, at 83.

The rehabilitation goal does not explain the special treatment given to workmen's compensation beneficiaries. There are many other important programs, both public and private, which contain provisions for disability payments affecting a substantial portion of the work force, and which do not require an offset under the Social Security Act.

Thus, had Belcher's supplemental disability payment come from a Veterans' Administration program,[1] a Civil Service Retirement Act[2] or Railroad Retirement Act[3]

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[1] In fiscal 1970, over 2,000,000 veterans received compensation for service-connected disabilities under statutes administered by the Veterans' Administration. Statistical Abstract of the United States 264 (1971) (hereinafter cited as Statistical Abstract). See generally 38 U. S. C. § 301 *et seq.* Benefits are also provided to certain veterans for non-service-connected disabilities. See generally 38 U. S. C. § 501 *et seq.* In 1967, total disability benefits from all Veterans' Administration programs amounted to $3,197,906,000. Berkowitz & Johnson, Towards An Economics of Disability: The Magnitude and Structure of Transfer and Medical Costs, 5 J. Human Resources 271, 282 (1970) (hereinafter cited as Economics of Disability). Raymond Belcher indicated on his application for social security disability benefits that he served for three years during World War II. Transcript of Hearings before Appeals Council 37. The record is silent, however, as to his potential eligibility for non-service-connected veteran's benefits.

[2] Employees covered by the Civil Service Retirement Act, 5 U. S. C. § 8301 *et seq.*, are entitled to a disability annuity after five years of civilian service. *Id.*, § 8337. In fiscal 1970, there were 184,000 disabled annuitants. Statistical Abstract 284.

[3] Title 45 U. S. C. § 228a *et seq.* provides disability benefits for railroad workers with 10 or more years of covered service. Covered

annuity, a private disability insurance policy,[4] a self-insurer,[5] a voluntary wage-continuation plan, or the proceeds in an action in tort arising from the disabling injury, there would have been no reduction in his social security benefits. The offset under § 224 applies only to federal social security disability beneficiaries also receiving workmen's compensation payments, a group which in 1965 totaled only 1.4% of all social security disability bene-

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employment under this Act and the Civil Service Retirement Act is excluded from coverage under the Social Security Act. If, however, a worker's employment history separately qualifies him for dual coverage, supplemental payments under neither of these Acts results in an offset of social security disability payments. HEW publication, Social Security Programs in the United States 46, 108 (1968) (hereinafter cited as Programs).

[4] Participation in West Virginia's state workmen's compensation fund is optional with the employer. W. Va. Code Ann. §§ 23-2-1, 23-2-8 (1970). An employer who declines to participate, however, must provide equivalent benefits through private insurance or as a self-insurer. *Id.*, at § 23-2-9. Had the Pocahontas Fuel Co. elected to pay premiums to a private carrier rather than to the state fund—a decision over which Mr. Belcher presumably had no control other than that which might be exerted through the collective-bargaining process—the private insurance benefits would not have been offset under § 224. Over 26,000,000 employees are covered by some sort of private insurance program. Programs 115. In 1967, disability benefits from private insurance amounted to 1.3 billion dollars. Economics of Disability 278. This figure alone exceeded the total of all benefits paid by workmen's compensation programs for that year. *Ibid.*

[5] Were Mr. Belcher's employer large enough, it might have determined to become a self-insurer with respect to employee disability claims. Disability payments from self-insurers were required by state law to be at least equivalent to benefits available through the state fund, n. 3, *supra*, and they would also not be offset under § 224. In 1969, employers who were covered by private carriers and who were self-insurers paid a combined total of $2,008,000,000 in benefits. State and federal workmen's compensation funds paid only $604,000,000 in benefits. Statistical Abstract 289.

ficiaries.[6] Yet, of the 849,000 disabled workers who in 1965 received social security disability benefits,[7] over *sixteen* percent also received overlapping veteran's benefits,[8] and almost *fourteen* percent received benefits from private insurance maintained under the auspices of an employer or a union.[9] Congress is, of course, not required to address itself to all aspects of a social problem in its legislation. It must, however, justify the distinctions it draws between people otherwise similarly situated. Rehabilitation incentives are not a rational justification for the discrimination worked by § 224.[10] If it is at all rational to argue that duplicating payments "impede rehabilitation," the argument must apply to all such payments regardless of their source. The nature of the supplemental benefit has no relation to a worker's incentive to return to work.

Nor is § 224 designed to stem a possible "erosion" of state workmen's compensation plans. As MR. JUSTICE MARSHALL points out, *post*, at 94, § 224 itself provides that there shall be no reduction of federal social security benefits with respect to those state workmen's compensation plans which themselves offset federal social security

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[6] 1966 Survey of Disabled Adults, Office of Research & Statistics, Social Security Administration, Table 5 (hereinafter cited as Survey). This figure was confirmed during the hearings which led to the adoption of § 224 by Anthony J. Celebrezze, then Secretary of the Department of Health, Education, and Welfare. Hearings on H. R. 6675, before the Senate Committee on Finance, 89th Cong., 1st Sess., pt. 1, p. 152.

[7] Survey, Table 5.

[8] *Ibid.*

[9] *Ibid.*

[10] Assuming the rationality of rehabilitation as a goal with respect to temporary disabilities, there is still no justification for applying an offset with respect to disabilities concededly permanent in nature. Nevertheless, the statute requires this to be done. The record does not reveal the status of Mr. Belcher's disability.

benefits against state payments. Thus, the statute encourages States concerned about overcompensation of disabled workers to cut back on their own programs. But the "rational basis" discerned by the majority requires the statute to have precisely the opposite purpose.

I would affirm the judgment of the District Court.

MR. JUSTICE MARSHALL, with whom MR. JUSTICE BRENNAN joins, dissenting.

In my view, the offset provision of § 224 of the Social Security Act, 42 U. S. C. § 424a, 79 Stat. 406, creates an unlawful discrimination under the Due Process Clause of the Fifth Amendment.

Before this 53-year-old appellee became disabled in March 1968, he was supporting his wife and two children on total yearly earnings of approximately $6,600. Once disabled, he could not work, but he and his family were awarded federal social security disability benefits totaling $329.70 per month.[1] Because his employer had chosen to set up a workmen's compensation fund, appellee also became entitled to workmen's compensation benefits totaling $203.60 per month. These were his only forms of disability compensation. Had appellee been allowed to keep his initial award of federal benefits, his income would have totaled nearly $6,400 a year, somewhat less than he had earned before his disability. But because of the offset provision of § 224, appellee's monthly federal payments were reduced, solely because the supplement to his federal benefits was in the form

[1] The test for disability under the federal statute is a stern one. With an exception for elderly blind people, disability means "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months . . . ." 42 U. S. C. § 423 (d)(1)(A).

of state workmen's compensation. As a result, appellee's total yearly income was reduced to $5,146.80.

Appellee complains that the offset provision is unconstitutional because it places its severe burden on a single class of disabled persons without adequate justification. Under the challenged offset provision, federal social security disability benefits are reduced only for those persons whose disability entitles them to workmen's compensation. Other persons who receive other kinds of disability compensation—for example, private insurance benefits or tort damages—are allowed the full amount of federal social security benefits. The question here is whether workmen's compensation beneficiaries may be singled out in this way for a reduction in federal benefits.

Starting from the assumptions that federal social security insurance, like welfare assistance, is a "public benefit" in which the beneficiaries have neither contract nor property interests, and that statutory classifications affecting the basic needs of individuals are viewed no differently under the Constitution from classifications in the area of business regulation, the Court concludes that the classification here has a reasonable basis and is consistent with the Fifth Amendment. To reach today's result, the Court revitalizes *Flemming* v. *Nestor*, 363 U. S. 603 (1960),[2] and extends the doctrine of *Dandridge* v. *Williams*, 397 U. S. 471 (1970), to statutory classifications under *federal* law.[3] Thus, the Court to-

[2] *Flemming* was a 5–4 decision upholding a federal statute that terminated the old-age benefits of the family of a fully eligible worker, because he was deported as a former member of the Communist Party. The case has not met with unanimous critical acclaim. See Reich, The New Property, 73 Yale L. J. 733, 768–771, 775 (1964). Prematurely, it would appear, some scholars had predicted its demise. *E. g.*, The Supreme Court, 1969 Term, 84 Harv. L. Rev. 1, 103–104 (1970).

[3] In *Dandridge*, the Court held that a State's maximum grant regulation for welfare recipients did not unconstitutionally dis-

day holds that Congress can take social security benefits from a disabled worker as long as it does not behave in an "arbitrary" way; classifications in the federal social security law are consistent with the Fifth Amendment if they are "rationally based and free from invidious discrimination."

In opposing this course, I adhere to my dissenting views in *Dandridge* v. *Williams*. I continue to believe that the "rational basis" test used by this Court in reviewing business regulation has no place when the Court reviews legislation providing fundamental services or distributing government funds to provide for basic human needs. In deciding whether a given classification is consistent with the requirements of the Fifth or Fourteenth Amendment,[4] we should look to "the character of the classification in question, the relative importance to individuals in the class discriminated against of the governmental benefits that they do not receive, and the asserted state [or federal] interests in support of the classification." *Dandridge* v. *Williams, supra,* at 521 (MARSHALL, J., dissenting); cf. *Williams* v. *Rhodes,* 393 U. S. 23, 30 (1968). Under this approach, it is necessary to consider more than the character of the classification and the governmental interests in support of the classification. Judges should not ignore what everyone knows, namely that legislation regulating business cannot be equated with legislation dealing with destitue, disabled, or elderly individuals. Thus, in assessing the lawfulness of the special disadvantages suffered here by workmen's

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criminate between children in large and small families. The regulation was challenged under the Equal Protection Clause of the Fourteenth Amendment.

[4] I would use essentially the same approach when statutory classifications are challenged under either Amendment. Cf. *Bolling* v. *Sharpe,* 347 U. S. 497 (1954).

compensation beneficiaries, the Court should consider the individual interests at stake. Federal disability payments, even when supplemented by other forms of disability compensation, provide families of disabled persons with the basic means for getting by. I would require far more than a mere "rational basis" to justify a discrimination that deprives disabled persons of such support in their time of need.

It is unnecessary to elaborate further the analysis required by the principles of my *Dandridge* dissent. For even under the Court's "rational basis" test, the discriminatory offset provision here cannot be sustained. There simply is no reasonable basis for singling out recipients of workmen's compensation for a reduction of federal benefits, while those who receive other kinds of disability compensation are not similarly treated.

This is not to say that an offset scheme is intrinsically impermissible. Arguably, Congress has an interest in paying greater benefits to people who are relying completely on the federal social security program, and lesser benefits to people who have other sources of disability compensation. But the question here is not whether Congress has the power to prevent "duplicative" payments that might exceed previous take-home pay and might thereby discourage disabled workers from returning to work.[5] The issue is whether Congress may single

[5] The offset idea has had a rocky history. As the majority notes, a prior offset provision was repealed in 1958 because Congress believed that "the danger that duplication of disability benefits might produce undesirable results [was] not of sufficient importance to justify reduction of the social security disability benefits." H. R. Rep. No. 2288, 85th Cong., 2d Sess., 13. The present offset provision was restored to the Act in 1965. It was estimated at the time that no more than 2% of the federal social security disability beneficiaries also received workmen's compensation. Hearings on

out for the purpose of applying the offset only those who are receiving workmen's compensation, and exclude those who are receiving similar supplemental disability compensation from other sources. A concern about excessive combined benefits and "rehabilitation" does not explain that distinction.

What, then, is the "rational basis" for the disfavored treatment of persons receiving workmen's compensation? The majority, in its conclusory treatment of this question, appears to say that workmen's compensation "satisf[ies] a need" which is special; and, claiming to rely on "the reasoning of Congress as reflected in the legislative history," the majority finds that Congress "anticipated that a perpetuation of the duplication in benefits might lead to the erosion of the workmen's compensation programs." I cannot accept that argument as a justification for this statute. There is nothing in the Senate, House, or Conference Reports indicating that this was the basis for the legislation actually passed.[6] And I do not think that the argument is in fact rational. The statutory discrimination exceeds the maximum amount of irrationality and arbitrariness countenanced by the Fifth Amendment.

Workmen's compensation programs serve precisely the same function as other forms of disability insurance and

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H. R. 6675 before the Senate Committee on Finance, 89th Cong., 1st Sess., pt. 1, p. 152.

It is perhaps plausible to reason that duplicative benefits might in some circumstances discourage rehabilitation and a return to work. It is worth noting, however, that even without the offset provision, appellee's combined benefits would not have exceeded his earnings before disability. See *supra*, at 88.

[6] The sole concern expressed in these documents is that Congress should prevent "excessive combined benefits." S. Rep. No. 404, 89th Cong., 1st Sess., pt. 1, p. 100; see also H. R. Conf. Rep. No. 682, 89th Cong., 1st Sess.; H. R. Rep. No. 213, 89th Cong., 1st Sess.

tort damage suits. The payments assist workers in the same way, and satisfy the same need. Indeed, in appellee's home State of West Virginia, as in most States, workmen's compensation is by statute the complete functional equivalent of tort liability, since employers who participate in workmen's compensation cannot be sued for tort damages by disabled employees. W. Va. Code Ann. § 23–2–6. Moreover, no distinction can be drawn on the basis of the source of the payments. In West Virginia, as in most States, workmen's compensation is financed privately, just like other forms of insurance and like tort damages. Usually the benefits are paid directly by the employer (as a self-insurer) or by the employer's insurance carriers (in which case the employer pays the premiums). See 3 A. Larson, Law of Workmen's Compensation § 92.10, p. 444 (1971); W. Va. Code Ann. § 23–2–1 *et seq.* I see no basis for singling out workmen's compensation programs for special protection or solicitude.

More pointedly, however, it defies logic to claim that § 224 could to any extent protect or encourage workmen's compensation in the manner suggested by the Court. In support of its claim that § 224 might discourage the erosion of workmen's compensation, the appellant relies heavily on a statement made by a representative of the Council of State Chambers of Commerce to the Senate Committee on Finance:

> "A matter of equal concern is the impact of Federal disability payments on State workmen's compensation programs. Legislative proposals have been offered in several States (Colorado, Florida, Maryland, and Minnesota) to reduce workmen's compensation benefits by the amount of [social security] disability benefits payable to a disabled worker. If other States follow this direction . . . we believe it

> will be only a matter of time until State workmen's compensation programs are destroyed." Hearings on H. R. 6675 before the Senate Committee on Finance, 89th Cong., 1st Sess., pt. 1, p. 259.

In addition, the Government refers to the testimony of another Chamber of Commerce representative:

> "Encroachment by social security is hampering efforts to improve the State workmen's compensation systems where improvements are needed. Faced with sharply rising costs and the duplication of benefits, employers in several States have supported legislative proposals to reduce workmen's compensation benefits by the amount of social security disability benefits." *Id.*, at 252.

I am unable to see how § 224 is connected to this asserted rationale. The federal offset provision provides for the reduction of *federal* benefits if the total of those benefits and the workmen's compensation benefits exceeds 80% of "average current earnings." However, federal benefits may not be reduced if the workmen's compensation plan provides for a reduction of *its* benefits in the event of an overlap. § 224 (d). Thus, if a State or employers in the State want to save money, the federal statute invites them to reduce workmen's compensation benefits by means of an offset provision of their own. I do not see how it is possible to argue that the federal statute is designed to prevent States from adopting their own offset provisions. If anything, the States are encouraged to cut back on their programs.[7]

[7] Indeed, where they are free to do so, see 3 A. Larson, Law of Workmen's Compensation 522, Appendix A, Table 7 (1971); W. Va. Code Ann. §§ 23-2-1, 23-2-8, individual workers are encouraged to opt out of workmen's compensation and purchase private disability insurance.

Even if it were possible to believe that the challenged federal offset provision might in some way forestall States and employers from creating offset provisions in their workmen's compensation programs, I do not see how state offset provisions could to any degree "lead to the gradual weakening or atrophy of [those] programs." *Ante,* at 84.[8] How do offset provisions hurt a program? It is as preposterous to suggest that state offset provisions could lead to the destruction of workmen's compensation as it would be to argue that the current federal offset provision might destroy the federal social security program. Such manufactured and totally illusory concerns cannot be deemed rational.

The plain fact is that Congress passed this offset provision because it thought disabled persons should not receive excessive combined disability payments. Perhaps by oversight,[9] it arbitrarily singled out workmen's compensation benefits from the universe of disability compensations, and required that workmen's compensation *alone* was to be offset against federal social security. If the majority's "rational basis" test in fact is to have any meaning, Congress cannot be permitted to single out recipients of workmen's compensation for this adverse

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[8] It is worth noting that payments for total and permanent disability are only a small part of the total scheme of compensation of any workmen's compensation act. Benefits are also provided for medical and hospital expenses, funeral expenses, rehabilitation, specific scheduled losses, temporary disability, and other forms of loss, see, *e. g.*, W. Va. Code Ann. §§ 23–4–3, 23–4–4, 23–4–6, all of which are unaffected by social security.

[9] Secretary of HEW Celebrezze opposed the present offset provision, arguing that any change should await a more thorough study of the overlap problem. Hearings on H. R. 6675 before the Senate Committee on Finance, 89th Cong., 1st Sess., pt. 1, p. 146. The Committee chose not to wait.

treatment. The burden of reduced federal benefits—so devastating to the families of the once-working poor—cannot be imposed arbitrarily under the Fifth Amendment. In my view, that has happened here. I dissent.[10]

[10] Since, in my view, the present discriminatory offset provision cannot stand, there is no need to decide finally whether Congress has the power to pass an offset provision which would qualify an already accrued interest in social security benefits. Whatever might be said about the characterization of welfare assistance as "property," see *Goldberg* v. *Kelly*, 397 U. S. 254, 262 n. 8 (1970), surely a worker who is forced to pay a social security tax on his earnings has a clearly cognizable contract interest in the benefits which justify the tax. The chacterization of this interest as "noncontractual" in *Flemming* v. *Nestor*, 363 U. S. 603, 611 (1960), is, in my view, incorrect. The analogy to an annuity or insurance contract, rejected there, seems apt. *Id.*, at 624 (Black, J., dissenting). See also Reich, The New Property, *supra*. Of course, as the court says, Congress may "fix the levels of benefits under the Act or the conditions upon which they may be paid." But once Congress has fixed that level and those conditions, and a worker has contributed his tax in accord with the law, may Congress unilaterally modify the benefits in a way which defeats the expectations of beneficiaries and prospective beneficiaries? At the least, it would seem that after a worker has contributed the tax for 20 quarters, 42 U. S. C. § 423 (c)(1), and his interest in the benefits has fully accrued, Congress may not unilaterally qualify that interest by introducing an offset provision not previously contemplated by the parties.